# NOTES

## REDEFINING WHAT IT MEANS TO DISCRIMINATE BECAUSE OF SEX: *BOSTOCK*'S EQUAL PROTECTION IMPLICATIONS

*Susannah Cohen**

Bostock v. Clayton County *has been widely recognized as momentous for providing LGBTQ Americans with protection against workplace discrimination, helping to safeguard their economic wellbeing and dignity. But it also has the potential to impact sex discrimination jurisprudence even more broadly. This Note argues that* Bostock *fundamentally redefined what it means to discriminate because of sex, expanding the definition to include discrimination based on any characteristic that is definitionally related to, and thus logically inseparable from, sex. Situating this decision within sex discrimination jurisprudence and extrapolating from Title VII to the Fourteenth Amendment context, this Note demonstrates that* Bostock*'s redefinition challenges earlier decisions that excluded certain forms of sex discrimination, such as pregnancy discrimination and reproductive choice restrictions, from equal protection's scope. Intentional or not, the majority's rationale ensured that the decision would enter into the decades-long search for the true meaning of sex discrimination.*



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## INTRODUCTION

*"I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."*

— Justice Ruth Bader Ginsburg, quoting Sarah Grimké[1]

While Sarah Grimké first authored these words nearly two hundred years ago, Justice Ginsburg revived them when she quoted this line to open her eponymous documentary. It is striking that this quote from a woman in the mid-nineteenth century would resonate so strongly with twenty-first-century women that the filmmakers chose it to frame the film. Grimké penned these words in a cultural and legal landscape almost unrecognizable to modern eyes—slavery was legal and thriving,[2] women could not

1. RBG, at 01:33–01:46 (Storyville Films 2018) (cleaned up) (available on Netflix) (quoting Letter from Sarah Moore Grimké to Mary S. Parker (July 7, 1837), *in* Letters on the Equality of the Sexes, and the Condition of Woman 9, 10 (1838) (on file with the *Columbia Law Review*)).

2. See The Civil Rights Act of 1964: A Long Struggle for Freedom, Libr. of Cong., https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html [https://perma.cc/3F7Y-5RKC] [hereinafter Civil Rights Act of 1964 Timeline] (last visited Sept. 30, 2021) (providing a timeline of important civil rights events and demonstrating that slavery was lawful in the United States until adoption of the Thirteenth Amendment in 1865).

vote,[3] and there were no federal civil rights laws.[4] And yet, Grimké's words connected with Justice Ginsburg very deeply. Louise Knight, a historian writing a biography on Grimké, posited why this connection "makes sense": "Though born 141 years apart, both women encountered obstacles because of their gender; both women insisted that 'our brethren' take their feet 'off our necks.' And they both gravitated toward the law. Grimké wanted to become a lawyer and a judge, too. She wanted to become what Ginsburg became."[5]

Justice Ginsburg is well known as one of the founders of modern sex discrimination jurisprudence, based in large part on the cases she brought as a litigator before joining the Supreme Court.[6] In the wake of the tremendous loss of Justice Ginsburg, countless tributes celebrated her legacy through the lens of her impact on sex discrimination law.[7] Ginsburg's litigation was momentous for successfully establishing that the Fourteenth Amendment's Equal Protection Clause protects against discrimination based on sex.[8] But the import of these cases went even further—they set the framework for how the judiciary, legal scholars, and the American public understand sex discrimination.[9] Grimké's analogy of "feet" on women's

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3. See id. (showing that women did not have the right to vote until adoption of the Nineteenth Amendment in 1920).

4. See id. (indicating that the Civil Rights Act of 1866 was the first federal civil rights law).

5. Louise W. Knight, Opinion, The 19th-Century Powerhouse Who Inspired RBG, CNN (Sept. 1, 2018), https://www.cnn.com/2018/09/01/opinions/ruth-bader-ginsburg-rbg-and-grimke-sisters-louise-knight/index.html [https://perma.cc/BTB8-6JPD].

6. See, e.g., Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 86 (2010) [hereinafter Franklin, Anti-Stereotyping Principle] (arguing that Ginsburg's "foundational" 1970s equal protection cases "helped to shape the Court's sex-based equal protection jurisprudence").

7. See, e.g., Brenda Feigen, Goodbye, Old Friend: Tribute to Justice Ruth Bader Ginsburg, 121 Colum. L. Rev. 519, 536 ("[I]t's clear that without Ruth we would not be accorded the level of scrutiny that is applied today in sex discrimination cases."); Mary Ziegler, 'One of the Most Articulate Defenders of a Right to Choose Abortion', *in* 'The Most Important Woman Lawyer in the History of the Republic', Politico Mag. (Sept. 18, 2020), https://www.politico.com/news/magazine/2020/09/18/ruth-bader-ginsburg-legacy-418191 [https://perma.cc/3TJG-UXJ6] [hereinafter Politico, The Most Important Woman Lawyer] ("Anyone looking to understand the law of sex discrimination in the United States should begin with Ruth Bader Ginsburg.").

8. See infra section I.B; see also Linda Hirshman, 'She Pivoted the Entire Structure of the 14th Amendment', *in* Politico, The Most Important Woman Lawyer, supra note 7 (explaining that Ginsburg's litigation campaign in the 1970s and '80s "pivoted the entire structure of the 14th Amendment to cover equal rights for women").

9. See Cary Franklin, A Champion of the Constitution's Democratic Ideals, *in* Politico, The Most Important Woman Lawyer, supra note 7 ("As an advocate, Justice Ginsburg did more than any other lawyer in American history to help the Supreme Court, and the nation, recognize that sex discrimination contravened the[] constitutional guarantees [of liberty and equality]."); Ziegler, supra note 7 ("[Ginsburg's] work changed what we mean when we talk about discrimination.").

"necks" takes on added significance as a window into how Justice Ginsburg understood sex discrimination—legal barriers that create artificial obstacles to women's full participation in society.[10]

But what exactly does it mean to discriminate because of sex? Even if the definition of sex is clear,[11] the definition of sex discrimination does not follow seamlessly. After decades of case law, the Supreme Court has established certain principles for determining what constitutes sex discrimination, but much ambiguity remains.[12] Even in cases where a court has found discrimination because of sex, the perpetrator is almost never actually scrutinizing the target's biology.[13] Thus, to discriminate because of sex must mean something more than treating someone worse solely because of their biology.

*Bostock v. Clayton County*,[14] a recent Supreme Court decision, waded into this muddled jurisprudence and immediately made a splash; however, its full meaning and scope are not immediately clear. The holding, that Title VII's prohibition on sex discrimination includes discrimination

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10. See Jeffrey Rosen, RBG's Life, in Her Own Words, Atlantic (Sept. 19, 2020), https://www.theatlantic.com/ideas/archive/2020/09/rbgs-life-her-own-words/616414/ (on file with the *Columbia Law Review*) (citing Nat'l Const. Ctr., 2020 Liberty Medal Honoring Justice Ruth Bader Ginsburg, YouTube, at 45:35–46:02 (Sept. 17, 2020), https://www.youtube.com/watch?v=Hzk4HWZiQoc (on file with the *Columbia Law Review*) (describing her litigation goals as "removing artificial barriers blocking women's engagement in many fields of human endeavor")).

11. In reality, the definition of sex, in society at large and under the law, is not settled. Many scholars have demonstrated how the law's treatment of sex has vacillated between biology, performance, gender norms, and more. See, e.g., Mary Anne C. Case, Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 17 (1995) ("Courts toss around the words 'gender,' 'masculine,' 'feminine,' and 'sex stereotyping' fairly often in sex discrimination cases. But they do not always use these terms consistently or self-consciously, and they do not always recognize gender issues when such issues are presented."); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, The Meaning of *Sex*: Dynamic Words, Novel Applications, and Original Public Meaning, 119 Mich. L. Rev. 1503, 1549–60 (2021) (explaining how the use of "sex" in 1964 included what we now think of as gender, and arguing that the *Bostock* majority switched from "the assumption of sex as biology" to "sex as gender" during the course of the opinion); see also infra notes 36–42 and accompanying text. This Note accepts, for purposes of argument and as the *Bostock* majority claims to, a biology-based definition of sex. See Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020). The argument, however, could apply to any definition of sex.

12. See infra Part I.

13. See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. Pa. L. Rev. 1, 36 (1995) ("When women are denied employment, for instance, it is not because the discriminator is thinking 'a Y chromosome is necessary in order to perform this kind of work.' Only in very rare cases can sex discrimination be reduced to a question of body parts.").

14. 140 S. Ct. 1731.

based on sexual orientation and gender identity,[15] is fairly straightforward. Its broader implications, on the other hand, are still emerging.

This Note offers one interpretation for *Bostock*'s implications. It argues that *Bostock* fundamentally redefined what it means to discriminate because of sex, expanding the definition to include discrimination based on any characteristic that is definitionally related to, and thus logically inseparable from, sex. Situating this decision within sex discrimination jurisprudence and extrapolating from Title VII to the Fourteenth Amendment context,[16] this Note demonstrates that *Bostock*'s redefinition challenges earlier decisions that excluded certain forms of sex discrimination, such as pregnancy discrimination and reproductive choice restrictions, from equal protection's scope. Intentional or not, the majority's rationale ensured that the decision would enter into the decades-long search for the true meaning of sex discrimination.

This Note proceeds in three parts. Part I traces the history of constitutional sex discrimination jurisprudence, including the seminal cases that established the framework for this area of law and the scholarship that has helped explain and shape it. It also discusses the areas of apparently sex-based state action that the Court has deemed outside the scope of equal protection's prohibition on sex discrimination, specifically focusing on laws regulating pregnancy and abortion access. Part II examines *Bostock* in depth, delving into the opinions' definitions of sex discrimination. It posits that the majority's definition of sex discrimination expanded its scope, enveloping a wider array of sex-based regulation. Part III examines how *Bostock*'s redefinition applies to prior and future decisions, demonstrating that *Bostock* provides the basis for holding that laws regulating pregnancy and abortion access are sex-based and thus should be subject to intermediate scrutiny.

## I. DEFINING SEX DISCRIMINATION: BEFORE *BOSTOCK*

This Part traces the theory and history of sex discrimination jurisprudence, focusing on the Equal Protection Clause. This discussion demonstrates that the Court has relied on varied, sometimes conflicting conceptions of sex discrimination to determine whether a particular practice is unlawful. Section I.A outlines the main theories of sex discrimination to provide a theoretical framework for understanding the jurisprudence. Section I.B examines major cases in sex discrimination law, particularly under the Equal Protection Clause, highlighting the theories of sex discrimination on which each case relies. Section I.C focuses on forms of discrimination that have been traditionally excluded from the scope of equal protection.

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15. Id. at 1754.

16. For an explanation of why this extrapolation is justified, see infra notes 248–249 and accompanying text.

### A. *Theories of Sex Discrimination*

This section examines the major theories of sex discrimination that have informed the law's development. This background is essential for understanding the case law, as the Court has pulled from each of these theories of sex discrimination in one or more cases. Section I.A.1 discusses the major recognized forms of sex discrimination, and section I.A.2 highlights one prominent theory explaining how the Court determines whether laws discriminating based on sex are constitutionally valid. This discussion seeks to demonstrate that the Court, prior to *Bostock*, had not settled on a comprehensive definition of sex discrimination that would encompass all forms of action and conduct that legal feminists find harmful.

1. *Forms of Sex Discrimination.* — The Court's early sex discrimination cases focused on laws creating sex-based classifications.[17] Classifications occur when a law distinguishes between people based on a certain trait.[18] A law might create a facial classification, as when the statute's terms explicitly draw a distinction based on a particular trait.[19] Once a court finds a facial classification, it will determine whether the law is valid by applying the level of scrutiny appropriate for the trait in question.[20] Alternatively, a law might be facially neutral, but have a discriminatory impact on certain groups of people. If a court finds that a law has a discriminatory impact and there was a discriminatory purpose behind the law's creation, then it will treat the law as creating a classification and subject it to the appropriate level of scrutiny.[21] Before the late 1900s, many federal laws contained explicit sex-based classifications.[22] Unsurprisingly, the Court's early sex discrimination jurisprudence centered on such laws.[23]

The Court has recognized a definition of sex discrimination encompassing more than just policies of not hiring women. The Court has rightfully acknowledged the varying ways that sex discrimination can manifest—most notably, sex stereotyping that affects both women and

17. See infra section I.B.

18. See Erwin Chemerinsky, Constitutional Law: Principles and Policies 726–27 (6th ed. 2019) [hereinafter Chemerinsky, 6th ed.].

19. Id.

20. Id.

21. Id. Under Supreme Court precedent, plaintiffs cannot bring disparate impact claims under the Fourteenth Amendment. Washington v. Davis, 426 U.S. 229, 238–48 (1976).

22. See, e.g., Brief for Appellant at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596 (explaining that there remained "many areas . . . where women are relegated [by law] to second class status").

23. See infra section I.B.

men.[24] In *Price Waterhouse v. Hopkins*, the Court ruled that making an employment decision based on an employee's failure to conform to a sex stereotype is a form of prohibited sex discrimination under Title VII.[25] The Court explained that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[26] Based on the facts of the case, the Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," so this action could violate Title VII.[27] *Hopkins* provides a clear articulation of the principle that sex stereotyping is sex discrimination, a principle that runs throughout constitutional sex discrimination jurisprudence.[28]

2. *"Real" Differences.* — Feminist legal scholarship has long recognized the Court's harmful reliance on "real" biological differences in determining whether laws discriminating on the basis of sex are valid.[29] Using intermediate scrutiny to assess laws distinguishing between women and men, the Court has frequently upheld laws it views as based on biological differences.[30] As many scholars have proven, however, such laws are often really

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24. See Barbara T. Lindemann, Paul Grossman & Geoff Weirich, Ch. 10.IV.B: Sex Stereotyping (6th ed., 2020) (discussing cases in which the Supreme Court and other courts have found sex stereotyping to be actionable sex discrimination).

25. 490 U.S. 228, 250 (1989).

26. Id. at 251 (internal quotation marks omitted) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

27. Id. at 250.

28. See Franklin, Anti-Stereotyping Principle, supra note 6, at 86–88 (claiming that the Court's sex-based equal protection jurisprudence was shaped by then-lawyer Ginsburg's theory that, under the Constitution, "the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles").

29. See, e.g., Noa Ben-Asher, The Two Laws of Sex Stereotyping, 57 B.C. L. Rev. 1187, 1190–91, 1194 (2016) (arguing that the case law has established two categories of sex stereotyping—impermissible "division-of-labor stereotyping" and permissible "stereotyping along the male/female binary"—and that this framework has allowed "forms of harmful body stereotyping" to persist); Franke, supra note 13, at 3–4 (arguing the Court has used "sexual differences as the starting point of equality discourse," upholding laws it deems as based on "the truth of biological sexual difference").

30. See, e.g., Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 58–59, 63 (2001) (upholding, against an equal protection challenge, a law providing automatic citizenship to children born out of wedlock in a foreign country to American mothers, but not American fathers, based on a finding that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood"); Rostker v. Goldberg, 453 U.S. 57, 72–83 (1981) (upholding, against an equal protection challenge, a law requiring men but not women to register for the draft, deferring to Congress's judgment that "staffing noncombat positions with women . . . would be positively detrimental to the important goal of military flexibility," impliedly based on physical differences between the sexes); Michael M. v. Superior Court, 450 U.S. 464, 471, 473 (1981) (plurality opinion) (upholding, against an equal protection

based on sex stereotypes about women's "proper" roles as mothers and caretakers and thus perpetuate women's subordination.[31] Feminist legal scholarship is divided on how real physical differences should factor into the vision of sex equality. Some contend that physical differences are not as "real" as courts suppose[32] and are almost always used as cover for gender-based discrimination.[33] Others contend that the law must acknowledge physical differences in order to remedy inherent inequality.[34] In spite of these divisions, there is general consensus among feminist legal scholars that the Court's current jurisprudence allows pernicious forms of biology-based sex discrimination to continue.[35]

Scholarship addressing the Court's usage of the terms "sex" and "gender" highlights how the jurisprudence has accepted "real" differences between the sexes and relied upon them to find valid certain sex-discriminatory laws. Throughout the decades, the Court has used "sex" and "gender" inconsistently—sometimes treating them as interchangeable, and other times as distinct.[36] There is no recent comprehensive study

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challenge, a statutory rape law that criminalized only men's involvement in consensual sexual intercourse based on the claim that the women would be more physically and emotionally burdened by a resulting teen pregnancy).

31. See, e.g., Chemerinsky, 6th ed., supra note 18, at 820 ("Many purported biological differences that are invoked to justify legal distinctions are in reality just stereotypes . . . ."); Reva Siegel, Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 264–65 (1992) [hereinafter Siegel, Reasoning From the Body] (arguing that the Court has ignored the fact that regulations concerning "'real' physical difference[s] between the sexes . . . can nevertheless be sexually discriminatory").

32. See, e.g., Cary Franklin, Biological Warfare: Constitutional Conflict Over "Inherent Differences" Between the Sexes, 2017 Sup. Ct. Rev. 169, 170 [hereinafter Franklin, Biological Warfare] ("Many differences between men and women we now understand to be socially constructed were once viewed as biologically based.").

33. See, e.g., Franke, supra note 13, at 36 ("Only in very rare cases can sex discrimination be reduced to a question of body parts.").

34. See, e.g., Keith Cunningham-Parmeter, (Un)Equal Protection: Why Gender Equality Depends on Discrimination, 109 Nw. U. L. Rev. 1, 8 (2015) (advocating for allowing some sex-based classifications to create policies that combat the subordination of women by specifically addressing men); Linda J. Krieger & Patricia N. Cooney, The *Miller-Wohl* Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 Golden Gate U. L. Rev. 513, 541–42 (1983) ("The liberal [equal treatment] model . . . fails to focus on the effect of the very real sex difference of pregnancy on the relative positions of men and women in society and on the goal of assuring equality of opportunity and effect within a heterogeneous 'society of equals.'"); Ann C. Scales, Towards a Feminist Jurisprudence, 56 Ind. L.J. 375, 435 (1981) ("In observing that [in utero pregnancy and breastfeeding] are the capabilities which *really* differentiate women from men, it is crucial that we overcome any aversion to describing these functions as 'unique.' Uniqueness is a 'trap' only in terms of an analysis . . . which assumes that maleness is the norm." (footnote omitted)).

35. See supra notes 29–34 and accompanying text.

36. See Case, supra note 11, at 17 ("Courts toss around the words 'gender,' 'masculine,' 'feminine,' and 'sex stereotyping' fairly often in sex discrimination cases. But they do not

of the Court's usage of these terms, but several scholars have theorized about the law's treatment of this distinction. Professor Katherine Franke argued that, as of 1995, sex discrimination jurisprudence regarded "[s]ex . . . as a product of nature" and "gender . . . as a function of culture."[37] The law was thus founded on the idea that "sex, conceived as biological difference, is prior to, less normative than, and more real than gender."[38] Based on this distinction, the Court has used "sexual differences as the starting point of equality discourse,"[39] creating a jurisprudence in which "the wrong of sex discrimination is premised upon a right of sexual differentiation, that is, a fundamental belief in the truth of biological sexual difference."[40]

Around the same time, Professor Mary Anne Case argued that sex discrimination jurisprudence did not adequately acknowledge the difference between sex and gender and that the law should reflect the "distinct meaning of gender" in order to expand equal protection's scope.[41] She contended that this jurisprudential change would not require legislative amendment; rather, courts need only "reconceptualiz[e] . . . the existing law," because "the existing statutory language and doctrinal categories, if correctly applied, already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts."[42] Though they espoused different interpretations of the case law, both scholars recognized the same problem—the Court's acceptance of biology-based distinctions has helped to perpetuate harmful sex discrimination. The "real" differences principle is essential for understanding the Court's sex discrimination jurisprudence.

### B. *Framework of Modern Sex Discrimination Jurisprudence*

More than one hundred years after the Fourteenth Amendment was enacted,[43] the Supreme Court began holding that the Equal Protection Clause prohibited certain laws that made distinctions based on sex.[44] From

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always use these terms consistently or self-consciously, and they do not always recognize gender issues when such issues are presented.").

37. Franke, supra note 13, at 1.

38. Id. at 2.

39. Id. at 3.

40. Id. at 4.

41. Case, supra note 11, at 2.

42. Id. at 4.

43. Civil Rights Act of 1964 Timeline, supra note 2 (showing that the Fourteenth Amendment was adopted in 1868).

44. See infra note 46 and accompanying text. Note that plaintiffs can only bring equal protection claims on the basis of government, not private, action. See Chemerinsky, 6th ed., supra note 18, at 553 ("The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not

the outset, the doctrine was muddled.[45] With each new case, the Court filled in details of what constitutes unlawful sex discrimination, relying on a particular definition of what it means to discriminate based on sex. This section discusses the development of the jurisprudence in order to situate *Bostock* and its implications within this history. It focuses on the cases that established the framework for sex discrimination jurisprudence under the Equal Protection Clause, discussing the Court's explicit or implicit definition of sex discrimination in each case.

*Reed v. Reed* in 1971 was the first time the Supreme Court invalidated a law because it used a sex classification, finding the classification at issue to constitute unconstitutional sex discrimination.[46] The case challenged a law imposing a mandatory preference for males over females when appointing an administrator of an intestate estate.[47] The Court, using what it identified as rational basis review, found the law unconstitutional.[48] Under this traditional rational basis articulation, the Court said that a legal classification based on gender "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[49] Thus, the question in this case was whether sex had a rational relationship to the ability to administer the estate, and the Court found that it did not.[50] In this brief opinion, the Court did not delve into the nature of sex discrimination.[51] However, in making this decision, the Court implicitly held that sex was an impermissible basis for legal classifications.[52]

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have to comply with the Constitution. This is often referred to as the 'state action' doctrine . . . .").

45. See Franke, supra note 13, at 7 (noting the Court's "confused and often inconsistent holdings with regard to the meanings and legitimacy of sex-based classifications").

46. 404 U.S. 71, 76–77 (1971); Chemerinsky, 6th ed., supra note 18, at 816.

47. *Reed*, 404 U.S. at 72–74.

48. Id. at 76–77.

49. Id. at 76 (internal quotation marks omitted) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). Whether the Court was really conducting only a rational basis review is open to debate. See infra note 52.

50. See Chemerinsky, 6th ed., supra note 18, at 816.

51. In fact, the word "discrimination" is used only in the decision's syllabus. See *Reed*, 404 U.S. at 71.

52. As Professor Erwin Chemerinsky explained:

> Although the Court purported to be using just the rational basis test and did not express the view that gender was a suspect classification, its reasoning was not characteristic of rational basis review. If the law had said, "when there are two people in a category who are equally qualified, one will be chosen by random selection," that surely would have been permissible under rational basis review. Therefore, the use of gender had to have been regarded by the Court as worse than random selection and an inappropriate ground to use to simplify administration. In other words, the

While the opinion did not mention her arguments specifically, the Court was likely influenced by the stereotype framework Ruth Bader Ginsburg laid out in her brief.[53] Ginsburg, who represented a woman seeking appointment as administratrix of her son's estate, highlighted the legal history of women's oppression and analogized sex discrimination to race discrimination in order to demonstrate why the Court should regard sex as a suspect classification.[54] She focused on the need to eradicate "law-sanctioned obstacles" to women "seeking to be judged on their individual merits" and contended that constitutional protection was the best way to achieve this goal.[55] Fitting her analysis into the preexisting legal framework, "Ginsburg convinced the Court of the arbitrariness of legislation 'based on overgeneralized and stereotypical notions of women.'"[56] Her arguments, and the Court's tacit acceptance, set the framework for sex discrimination jurisprudence as dismantling legal, stereotype-based barriers to equality.[57]

In the next major sex discrimination case, *Frontiero v. Richardson*, the Court greatly elaborated on the nature and harm of sex discrimination.[58] A majority of the Court found unconstitutional a law allowing service member men, but not women, to automatically claim their spouse as a dependent for purposes of receiving housing and medical benefits.[59] The Court split, however, on what standard applied—four Justices, the plurality, held that, based on precedent and logic (including a strong analogy to race),[60] sex-based classifications were inherently suspect and thus required strict scrutiny.[61] This opinion, which Justice William J. Brennan Jr. wrote, gave the following reasons for why sex is an inherently suspect class: "his-

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> Court implicitly had to regard gender as an impermissible basis for government decisions.

Chemerinsky, 6th ed., supra note 18, at 816.

53. See Brief for Appellant at 17, *Reed*, 404 U.S. 71 (No. 70-4), 1971 WL 133596 ("[L]egislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women.").

54. Id. at 14–41.

55. Id. at 6.

56. Toni J. Ellington, Sylvia K. Higashi, Jayna K. Kim & Mark M. Murakami, Justice Ruth Bader Ginsburg and Gender Discrimination, 20 U. Haw. L. Rev. 699, 727 (1998) (quoting Deborah L. Markowitz, In Pursuit of Equality: One Woman's Work to Change the Law, 14 Women's Rts. L. Rep. 335, 341 (1992)).

57. See id. (stating that the *Reed* Court "adopted Ginsburg's formulation of the equal protection principle").

58. 411 U.S. 677 (1973).

59. Id. at 690–91.

60. For a discussion of Brennan's treatment of the race–sex analogy, see Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 961–65 (2002).

61. *Frontiero*, 411 U.S. at 682, 688.

torical oppression, current discrimination, underrepresentation in the political process, stereotyping, paternalism, highly visible and immutable characteristics, and an unrelatedness of the classification to the ability to perform or contribute to society."[62] The plurality adopted the rationale and language of Ginsburg's *Reed* brief and her amicus brief in *Frontiero*, explaining that laws based on "romantic paternalism" and "gross, stereotyped distinctions" often "put women, not on a pedestal, but in a cage."[63] The opinion lamented that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[64] Sex discrimination, mostly in the form of legal classifications, restricted women's opportunities in spite of the fact "that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[65]

Other Justices disagreed with Brennan's opinion, primarily over its adoption of the strict scrutiny standard.[66] Three Justices, concurring in the judgment, said that the law was unconstitutional under *Reed* and that the Court should reserve the question of whether sex is inherently suspect for a later date.[67] These Justices criticized the plurality for acting when the Equal Rights Amendment, which would have required strict scrutiny for sex-based classifications, was pending.[68] The concurrence did not address the plurality's description of sex discrimination.

The Court settled on intermediate scrutiny as the standard under which courts should assess governmental regulations involving sex-based discrimination in *Craig v. Boren*.[69] Under this formulation of intermediate scrutiny, a law that makes classifications based on sex is constitutional if it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives."[70] One reason offered, in this case and later ones, for using intermediate rather than strict scrutiny for sex-based classifications was that such classifications are sometimes legitimate, because women are believed to be unable to perform some tasks that men

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62. Laura J. Geissler, Unfinished Business: Intermediate Scrutiny, "Real Differences," and "Separate-but-Equal" in United States v. Virginia, 116 S. Ct. 2264 (1996), 20 Hamline L. Rev. 471, 495 (1996).

63. *Frontiero*, 411 U.S. at 684, 685; see also Ellington et al., supra note 56, at 730.

64. *Frontiero*, 411 U.S. at 686–87.

65. Id. at 686.

66. See id. at 691 (Stewart, J., concurring in the judgment); id. at 691–92 (Powell, J., concurring in the judgment, joined by Burger, C.J. & Blackmun, J.); see also Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 253–55 (1979).

67. *Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring in the judgment, joined by Burger, C.J. & Blackmun, J.).

68. Id. at 692.

69. 429 U.S. 190 (1976).

70. Id. at 197.

perform (e.g., combat).[71] This nuance left room for some sex-based distinctions to withstand scrutiny.[72] The precise contours of what sorts of distinctions are acceptable has formed the basis of extensive scholarship,[73] evolving as the Court decides more cases. But the *Craig* Court offered some guidance: It explained that prior decisions established that "statutes employing gender as an inaccurate proxy for other, more germane bases of classification" are invalid.[74] The Court was primarily concerned with laws based on a "weak congruence between gender and the characteristic or trait that gender purported to represent," including laws based on "'archaic and overbroad' generalizations" and "outdated misconceptions."[75]

Moving ahead several decades, *United States v. Virginia*, also known as the Virginia Military Institute (VMI) case, is widely regarded as providing the most stringent version of the intermediate scrutiny standard for sex discrimination, using this rigorous test to extend equal protection's coverage.[76] The Court used "skeptical scrutiny," explaining that "[p]arties who

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71. See Chemerinsky, 6th ed., supra note 18, at 728–29 ("[T]he Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to be instances where sex is a justifiable basis for discrimination."); Reva B. Siegel, Gender and the United States Constitution: Equal Protection, Privacy, and Federalism, *in* The Gender of Constitutional Jurisprudence 306, 313 (Beverley Baines & Ruth Rubio-Marin eds., 2005) [hereinafter Siegel, Gender and the United States Constitution] ("[T]he more permissive standard is said to express the judgment that sex differentiation is not always invidious in the way that racial differentiation is generally assumed to be."); Gayle Lynn Pettinga, Note, Rational Basis With Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779, 784 n.58 (1987) ("The Court protects women and illegitimate children with a lower level of scrutiny than strict scrutiny for the following reasons: . . . (3) a gender classification is sometimes relevant because women are unable to perform some tasks that men perform, such as combat . . . ."); see also supra section I.A.2.

72. See Pettinga, supra note 71, at 784 ("This medium level scrutiny permits the Court to look more closely at the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under traditional analysis.").

73. See, e.g., Ben-Asher, supra note 29, at 1190–91 (arguing that the case law has established two categories of sex stereotyping: impermissible "division-of-labor stereotyping" and permissible "stereotyping along the male/female binary"); Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1448–50 (2000) (arguing that the Supreme Court never really applied intermediate scrutiny to sex discrimination, but rather inquired whether a sex-based classification provided an adequate proxy for some characteristic common to all members of one sex); Cunningham-Parmeter, supra note 34, at 19–36 (tracking the history of sex discrimination jurisprudence and arguing that it allows for sex-specific laws so long as they serve antisubordination principles); Franklin, Anti-Stereotyping Principle, supra note 6, at 119–42 (arguing that sex discrimination law seeks to limit the state's power to enforce sex-role stereotypes).

74. *Craig*, 429 U.S. at 198.

75. Id. at 198–99 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

76. See, e.g., Sabrina Ariel Miesowitz, ERA Is Still the Way, 3 N.Y.U. J.L. & Liberty 124, 132 (2008) ("The most powerful form of the intermediate scrutiny standard appeared in the case of *US v. Virginia* in 1996. The court's holding in this case raised the bar for scrutiny

seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[77] In this case, the Court found that VMI's policy of refusing to admit women violated the Equal Protection Clause and that creating an alternative all-women school did not properly remedy this violation.[78] The majority opinion acknowledged "inherent" and "[p]hysical" differences between men and women, explaining that under intermediate scrutiny, sex could form the basis for a legitimate classification.[79] Nevertheless, the opinion contended that sex-based classifications could be used only for compensatory purposes, not "to create or perpetuate the legal, social, and economic inferiority of women."[80]

A few years later, the Court decided *Nguyen v. Immigration & Naturalization Service*, a decision viewed by some as retreating from the stronger intermediate scrutiny of *Virginia*.[81] In this case, the Court found constitutional a law stating that a child born out of wedlock in a foreign country to an American mother was automatically a U.S. citizen, while one born to an American father was not.[82] The Court found that the sex-based classification was valid because it was rationally based on the biological differences existing between men and women and the resulting differences between mothers' and fathers' respective relationships to potential citizens at birth (i.e., there is greater certainty as to a child's mother, because she must carry the child and be present at the moment of birth, than their father).[83] The dissenters disagreed over whether the differences on which

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of sex-based classifications to its highest point." (footnote omitted)); Kevin N. Rolando, A Decade Later: *United States v. Virginia* and the Rise and Fall of "Skeptical Scrutiny", 12 Roger Williams U. L. Rev. 182, 185 (2006) ("Standing in the present, and looking back . . . *United States v. Virginia* appears as an anomaly . . . . Neither before nor after *United States v. Virginia* had the U.S. Supreme Court required a gender classification to meet the rigors of 'skeptical scrutiny.'"); Sarah M. Stephens, At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment, 80 Brook. L. Rev. 397, 410 (2015) ("*Virginia* represented the pinnacle of intermediate scrutiny as applied to sex discrimination cases. The inclusion of the 'exceedingly persuasive justification' language and the extent to which the Court's opinion repeated the phrase seemed to heighten the state's burden when defending a law discriminating on the basis of sex." (citing United States v. Virginia, 518 U.S. 515, 571–72 (1996) (Scalia, J., dissenting))).

77. *Virginia*, 518 U.S. at 531 (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136–37 & n.6 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

78. Id. at 534.

79. Id. at 533.

80. Id. at 533–34.

81. See, e.g., Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 Calif. L. Rev. 755, 830 (2004) (asserting that *Nguyen* demonstrated "the limitations of intermediate scrutiny as a reliable guarantor of sex-based equal protection").

82. Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 58–59 (2001).

83. Id. at 63 ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal

the majority relied "[were] real or social constructs and whether they should matter."[84] Erwin Chemerinsky, Dean of Berkeley Law and a prominent constitutional law scholar, characterized "*Nguyen*'s significance" as "allowing a gender classification benefitting women based on biological differences between men and women."[85]

Notably, in the 2017 case *Sessions v. Morales-Santana*, the Court found a seemingly similar sex-discriminatory citizenship statute to violate the Equal Protection Clause while claiming to follow both *Virginia* and *Nguyen*.[86] Justice Ginsburg, writing for the majority, found ways to distinguish the law at issue from the one in *Nguyen*.[87] In conducting this analysis, she revived *Virginia*'s articulation of intermediate scrutiny: "Successful defense of legislation that differentiates on the basis of gender . . . requires an 'exceedingly persuasive justification.'"[88] Some commentators recognized this decision as a victory for sex equality because it reinvigorated *Virginia*'s heightened intermediate scrutiny.[89] In fact, several Justices (none of them Ginsburg) recently used the *Virginia* "exceedingly persuasive justification" standard in denying certiorari.[90] Thus, while not entirely settled, there is a strong argument that current jurisprudence incorporates the *Virginia* standard of heightened intermediate scrutiny.[91]

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determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective."). The Court repeatedly referred, in various ways, to the difference in "biological inevitability" that "inheres in the very event of birth" as justification for the differential treatment. Id. at 65.

84. Chemerinsky, 6th ed., supra note 18, at 830.

85. Id.

86. 137 S. Ct. 1678, 1690 (2017) (citing both *Virginia* and *Nguyen* in articulating the intermediate scrutiny standard).

87. Id. at 1693–94.

88. Id. at 1690 (quoting United States v. Virginia, 518 U.S. 515, 531 (1996)).

89. See, e.g., Franklin, Biological Warfare, supra note 32, at 176 (calling "[t]he Court's decision to apply a robust form of equal protection analysis in *Morales-Santana* . . . a significant development" that "opens up possibilities for the extension of genuinely heightened equal protection scrutiny outside the conventional marital family"); Lenora M. Lapidus, Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment, 43 Harbinger 149, 153 (2019) (stating that, after *Virginia* and *Morales-Santana*, "we now have 'heightened scrutiny' in which an 'exceedingly persuasive justification' is required for any distinctions on the basis of sex under the Equal Protection Clause of the Fourteenth Amendment"); Mark Joseph Stern, Ruth Bader Ginsburg Affirms the "Equal Dignity" of Mothers and Fathers, Slate (June 13, 2017), https://slate.com/news-and-politics/2017/06/sessions-v-morales-santana-ruth-bader-ginsburg-defends-gender-equality.html [https://perma.cc/T94C-UYQ8] ("[T]he constitutional analysis in Ginsburg's opinion is . . . a liberal coup.").

90. Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815, 1815 (2021) (statement accompanying denial of certiorari by Justices Sonia Sotomayor, Stephen Breyer, and Brett Kavanaugh).

91. See, e.g., Chemerinsky, 6th ed., supra note 18, at 821 (stating that *Virginia* and *Morales-Santana*'s use of the "exceedingly persuasive justification" language means that sex-

### C. *Areas of Exclusion*

While it is not always clear what actions fall under the Court's definition of unlawful sex discrimination, the Court has drawn some clear lines excluding from equal protection analysis certain forms of discrimination that, on first glance, appear to be sex-based.[92] Specifically, the Court has refused to apply sex-based equal protection analysis to laws regulating women's[93] reproductive capacities.[94] The Court has held that laws apparently discriminating against pregnant women or those seeking abortions involve classifications based on a trait other than sex (i.e., status as a pregnant person or person seeking an abortion) and thus are not subject to intermediate scrutiny.[95] Underlying this exclusion is the Court's treatment of sex-based differences in this area as "real and relevant,"[96] leading it to believe that sex-based laws regulating reproduction do not raise the specter of unlawful discrimination.[97]

1. *Pregnancy.* — In *Geduldig v. Aiello*, the Court upheld a policy excluding pregnancy from a list of covered disabilities, finding that this exclusion did not constitute sex discrimination under the Equal Protection Clause.[98]

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discriminatory laws are subject to scrutiny that is "someplace between intermediate and strict scrutiny" (quoting *Morales-Santana*, 137 S. Ct. at 1990)).

92. Other notable areas of exclusion are military conscription and rape law. See Siegel, Gender and the United States Constitution, supra note 71, at 318–23. A discussion of these topics is beyond the scope of this Note.

93. This Note uses the term woman when discussing those with the capacity to become pregnant and seek an abortion. Because this Note focuses on the history of sex discrimination jurisprudence and accepts *Bostock*'s premises, it uses the language of these cases. The author recognizes that people who do not identify as women can also become pregnant and hopes that sex discrimination jurisprudence can incorporate more inclusive language and perspectives. See infra section III.B.3.

94. See Siegel, Gender and the United States Constitution, supra note 71, at 320–21 ("[T]he Court has refused to treat regulation directed at pregnant women [including state regulation of abortion] as sex-based state action that should trigger heightened equal protection scrutiny.").

95. Id.

96. Id. at 318–19, 321 (internal quotation marks omitted) (citing Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 14 Women's Rts. L. Rep. 151 (1992)) (asserting that the Court's exclusion of reproductive regulation from more rigorous equal protection analysis "conform[s] with the widespread intuition that pregnancy is an important sex difference that can justify differential treatment of the sexes").

97. Siegel, Reasoning From the Body, supra note 31, at 270 ("[T]he Court has continued to analyze reproductive regulation in physiological paradigms, interpreting the Equal Protection Clause in ways that suggest that regulation concerning pregnancy presents little possibility of sex discrimination.").

98. 417 U.S. 484, 497 (1974). Of note, the majority did not hold that pregnancy discrimination could never be sex discrimination under the Equal Protection Clause, but rather that pregnancy discrimination was not per se sex discrimination. See Reva B. Siegel, You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in

The Court asserted that this policy did not "discriminate against any definable group or class" because "[t]here is no risk from which men are protected and women are not" nor any "risk from which women are protected and men are not."[99] In a footnote, the Court claimed that this policy was "a far cry from cases like [*Reed*] and [*Frontiero*], involving discrimination based upon gender as such."[100] It continued:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The *lack of identity* between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[101]

The majority thus maintained that because sex and pregnancy are distinguishable characteristics, based on the "lack of identity" between the two as evidenced by the existence of women who are not pregnant, a law that distinguishes between people based on pregnancy status does not classify on the basis of sex.[102]

Justice Brennan, dissenting, rejected the contention that sex and pregnancy are wholly distinguishable: He identified pregnancy as a "gender-linked disability peculiar to women."[103] By excluding pregnancy from coverage, especially while covering male-specific procedures (e.g., proctectomies and circumcisions), the law treated men and women differently "on the basis of physical characteristics inextricably linked to one sex."[104] This opinion reflects a broader understanding of sex discrimination that includes all sex-linked characteristics.[105]

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*Hibbs*, 58 Stan. L. Rev. 1871, 1891–93 (2006) [hereinafter Siegel, You've Come a Long Way, Baby].

99. *Geduldig*, 417 U.S. at 496–97.

100. Id. at 496 n.20.

101. Id. (emphasis added).

102. Id.; Siegel, Gender and the United States Constitution, supra note 71, at 320.

103. *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

104. Id.

105. Of note, Justice Ginsburg, then a litigator, wrote an amicus brief in *Geduldig* arguing that employer policies treating pregnancy differently than other disabilities were based more on sex stereotypes than actual medical necessity. See Franklin, Anti-Stereotyping Principle, supra note 6, at 126–28 (citing Brief Amici Curiae of the ACLU et al. at 17, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185753). The Court did not follow this theory of sex discrimination. Id.

The Court extended *Geduldig*'s logic to the Title VII context in *General Electric Co. v. Gilbert*.[106] On facts very similar to *Geduldig*, the Court held that pregnancy discrimination was not sex discrimination under Title VII.[107] Even under a disparate impact theory (which is not viable under equal protection),[108] the Court found that there was no discriminatory effect because men and women were covered equally for areas in which they overlap.[109] The Court viewed pregnancy as an additional and unique risk that the employer was not required to cover.[110] Justice Brennan again dissented, arguing that in the context of the company's history of discriminating against women and the plan's coverage of male-specific procedures, it was clear that excluding pregnancy was sex-based discrimination.[111]

*Geduldig* met fiery opposition from the outset[112] and continues to be the target of feminist legal critique.[113] Critics have described the opinion as "infamous,"[114] "notoriously obtuse,"[115] and as "leav[ing] a gaping hole in the protection guaranteed women."[116] The criticism is twofold: First, the Court did not adequately address the fact that pregnancy is a sex-linked characteristic, so a pregnancy-based distinction necessarily distinguishes between people based on sex.[117] Second, the Court ignored the long history of using women's reproductive capacities as a reason and means for

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106. 429 U.S. 125 (1976).

107. Id. at 127–28.

108. See supra note 21.

109. *Gen. Elec. Co.*, 429 U.S. at 136–40 ("[W]e have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one . . . sex. Pregnancy is . . . confined to women, but . . . is in other ways significantly different from the typical covered disease or disability.").

110. Id. at 139.

111. Id. at 147–60 (Brennan, J., dissenting).

112. See Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 983–84 & nn.107–108 (1984) ("Criticizing *Geduldig* has since become a cottage industry.").

113. See, e.g., Maya Manian, Commentary on *Geduldig v. Aiello*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court 185, 187 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (calling the majority's definition of sex discrimination "exceedingly narrow" and stating that it ignored "the long history of women's subordination based on their capacity for pregnancy").

114. Siegel, Reasoning From the Body, supra note 31, at 268.

115. Manian, supra note 113, at 185.

116. Ruth Bader Ginsburg & Susan Deller Ross, Pregnancy and Discrimination, N.Y. Times (Jan. 25, 1977), https://www.nytimes.com/1977/01/25/archives/pregnancy-and-discrimination.html (on file with the *Columbia Law Review*).

117. See Siegel, Reasoning From the Body, supra note 31, at 269 ("The Court ignored the fact that the capacity to gestate distinguishes the sexes physically [and] . . . socially." (emphasis omitted)); cf. Chemerinsky, 6th ed., supra note 18, at 823 ("The Court's reasoning can be criticized because it appears that it is saying that pregnancy is not a sex-based characteristic.").

their subordination.[118] This restrictive definition of sex discrimination undermines women's ability to seek legal redress for core and persistent forms of sex discrimination.[119]

Several legislative and judicial developments in the years since *Geduldig* and *Gilbert* have fortified claims of pregnancy discrimination and undermined the cases' import; however, the reasoning that pregnancy discrimination is distinct from sex discrimination remains significant. Congress quickly overrode *Gilbert* with the Pregnancy Discrimination Act of 1978 (PDA), expanding Title VII's definition of sex discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[120] While the PDA arguably overruled *Geduldig*'s holding,[121] the *Geduldig* opinion remains relevant because "its reasoning is still applied by the Court in other contexts."[122] Most notably, the Court has used the rationale that pregnancy classifications are not sex-based to find no sex-based animus for restrictions on access to abortion.[123]

Another case, *Nevada Department of Human Resources v. Hibbs*,[124] arguably also undermined *Geduldig*'s rationale, but did not obviate its continuing harmful impact. In *Hibbs*, the Court found that Congress had power under the Fourteenth Amendment to establish mandatory, gender-neutral, federal family leave as it did in the Family and Medical Leave Act of 1993 (FMLA).[125] The decision rested largely on a recognition that the FMLA sought to "protect the right to be free from gender-based discrimi-

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118. Ginsburg & Ross, supra note 116 ("Women's child-bearing function has always played a central role in supporting sex discrimination."); see also Siegel, Reasoning From the Body, supra note 31, at 270 ("Because the Court evaluated the exclusionary pregnancy policy in a framework that focused on the physical rather than social relations of reproduction, it . . . could not see that the state's pregnancy policy reflected and enforced social judgments about women's roles.").

119. See Manian, supra note 113, at 185 ("[T]he *Geduldig* decision has never been explicitly overruled and continues to constrain women's access to substantive equality and reproductive liberty.").

120. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

121. See, e.g., Chemerinsky, 6th ed., supra note 18, at 823 ("Congress, by statute, effectively overruled *Geduldig* when it enacted the Pregnancy Discrimination Act . . . ."); Lorraine Hafer O'Hara, An Overview of Federal and State Protections for Pregnant Workers, 56 U. Cin. L. Rev. 757, 763 n.43 (1987) (stating that the PDA has implicitly overruled *Geduldig*).

122. Chemerinsky, 6th ed., supra note 18, at 823; see also Nancy Levit, The Gender Line: Men, Women, and the Law 71 (1998) ("The *Geduldig* theme that 'it does not follow that every legislative classification concerning pregnancy is a sex-based classification' is one that lives on in constitutional jurisprudence." (quoting Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974))).

123. See infra section I.C.2.

124. 538 U.S. 721 (2003).

125. Id. at 734–35; see also Chemerinsky, 6th ed., supra note 18, at 329.

nation in the workplace" by making leave gender neutral, rather than allowing employers to offer only maternity leave because of "stereotype-based beliefs about the allocation of family duties."[126] Some regard this decision as greatly undermining the significance of *Geduldig* by making clear that "regulation of pregnancy does constitute sex discrimination when it reinforces sex-role stereotypes."[127] But this interpretation of the decision is not widespread[128] and has not permeated reproductive rights jurisprudence.[129] Further, because it requires a finding that the state action at issue is based on sex stereotypes, this theory creates an extra hurdle before a court can reach equal protection analysis.[130]

2. *Reproductive Choice.* — In *Roe v. Wade*, the Court held that women had a constitutional right to choose to have an abortion under the privacy right found through the Due Process Clause of the Fourteenth Amendment.[131] This right is restricted by the state's countervailing interest in protecting prenatal life.[132] The Court in "*Roe* treated abortion as a purely physiological phenomenon, concentrating on female bodies and fetal bodies instead of inquiring if and when the regulation of pregnant women enforced stereotypes about women's family roles and deprived them of the decisional autonomy accorded to men."[133] It thus did not engage with how abortion might implicate sex equality or discrimination, instead grounding protection in the mother's right to privacy.[134] *Planned Parenthood v. Casey* reaffirmed *Roe*'s "essential holding," namely that due process provides a privacy right that includes the right to an abortion.[135]

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126. *Hibbs*, 538 U.S. at 728, 730.

127. Franklin, Anti-Stereotyping Principle, supra note 6, at 153–54; see also id. at 154 n.388 (citing Siegel, You've Come a Long Way, Baby, supra note 98, at 1873) ("Although *Hibbs* does not explicitly overrule *Geduldig*, it casts that decision in a decidedly new light . . . ."); Reva B. Siegel, The Pregnant Citizen, From Suffrage to the Present, 108 Geo. L.J. (Special Edition) 167, 170–73 (2020) [hereinafter Siegel, Pregnant Citizen] (arguing that subsequent Court cases, including *Virginia* and *Hibbs*, undermined *Geduldig* by placing "laws regulating pregnancy [into] the equal protection heightened-scrutiny framework").

128. See Siegel, Pregnant Citizen, supra note 127, at 171 (describing the belief that *Geduldig* "insulates the regulation of pregnancy from equal protection oversight" as the "dominant view").

129. See Courtney Megan Cahill, Abortion and Disgust, 48 Harv. C.R.-C.L. L. Rev. 409, 449–50 & n.268 (2013) (articulating "reasons to remain cautious about *Hibbs*'s applicability in the abortion context").

130. See id. ("[T]he *Hibbs* Court objected to workplace policies that perpetuated stereotypes about men and women both. It is unclear precisely how restrictive abortion laws perpetuate stereotypes about men." (citation omitted)).

131. 410 U.S. 113, 153 (1973); Chemerinsky, 6th ed., supra note 18, at 887.

132. See Chemerinsky, 6th ed., supra note 18, at 887–89.

133. Franklin, Anti-Stereotyping Principle, supra note 6, at 128.

134. See Siegel, Gender and the United States Constitution, supra note 71, at 324.

135. 505 U.S. 833, 846 (1992) (plurality opinion). Notably, the plurality opinion drew on equality principles, finding the right to abortion to be fundamental because, with this decision, "the liberty of the woman is at stake . . . . The destiny of the woman must be shaped

This case also established the undue burden test, under which a law regulating abortion is unlawful only if it creates an "undue burden on a woman's ability to make this decision."[136] Once again, the Court did not engage in an equal protection analysis in assessing the law's constitutionality.[137]

Feminist scholars have long lamented the Court's choice not to consider abortion regulations under the Equal Protection Clause,[138] arguing that because abortion prohibitions apply only to women, they are a form of unconstitutional sex-based discrimination.[139] The current jurisprudence considers laws regulating reproductive choice as "a form of state action that concerns physical facts of sex rather than social questions of gender," which would require intermediate scrutiny.[140] Professor Catharine MacKinnon provided a pithy explanation of why laws regulating abortion access raise questions of equal protection: "Forced motherhood is sex inequality."[141]

In the absence of precedent applying the Equal Protection Clause to laws regulating reproductive choice, the *Geduldig* rationale still permeates the law on abortion access.[142] For example, in *Bray v. Alexandria Women's Health*, the Court relied on *Geduldig* to hold that anti-choice protesters obstructing access to an abortion clinic were not targeting women as a class.[143] The Court explicitly invoked *Geduldig* for the proposition that just because a trait or activity is exclusively associated with women (i.e., pregnancy and abortion), disfavoring it is "not *ipso facto* sex discrimination."[144]

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to a large extent on her own conception of her spiritual imperatives and her place in society." Id. at 852. The opinion, however, did not actually rely on the Equal Protection Clause.

136. Id. at 874.

137. Cf. Siegel, Gender and the United States Constitution, supra note 71, at 327–28 (arguing that the *Casey* plurality opinion relied on "constitutional values of sex equality" even though "the undue burden standard . . . does not explicitly address" such values).

138. For an overview of equal protection arguments on *Roe*, see Chemerinsky, 6th ed., supra note 18, at 890–91.

139. See, e.g., Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 383 (1985); Law, supra note 112, at 987; Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1319 (1991).

140. Siegel, Reasoning From the Body, supra note 31, at 264.

141. MacKinnon, supra note 139, at 1319.

142. Chemerinsky, 6th ed., supra note 18, at 823; Siegel, Gender and the United States Constitution, supra note 71, at 320 ("As a practical matter, *Geduldig* frees state regulation of the pregnant woman's conduct—in matters of abortion or maternity leave—from equal protection scrutiny."); Shannon E. Liss, The Constitutionality of Pregnancy Discrimination: The Lingering Effects of *Geduldig* and Suggestions for Forcing Its Reversal, 23 N.Y.U. Rev. L. & Soc. Change 59, 69–71 (1997).

143. 506 U.S. 263, 270–71 (1993).

144. Id. at 273.

The Court has thus carved out pregnancy and abortion regulations from equal protection scrutiny by deeming them to be not sex-based.

## II. EXPANDING SEX DISCRIMINATION: *BOSTOCK*'S HOLDING

This Part delves into *Bostock*, scrutinizing the majority opinion and Justice Samuel Alito's dissent to determine how each opinion defines sex discrimination. Section II.A briefly summarizes the consolidated cases' factual backgrounds to provide context for the opinions' analyses. Section II.B examines Justice Neil Gorsuch's majority opinion and Justice Alito's dissent, arguing that the major division between the two is a difference in framing of the case's central question. For the majority, the question is: Can an employer discriminate based on sexual orientation and/or gender identity without considering the target's sex?[145] In contrast, for the dissent, the question is: Is sex the same as sexual orientation and/or gender identity?[146] This difference in framing leads the opinions to reach opposite conclusions. Section II.B argues that comparing the opinions reveals the majority's definition of sex discrimination: discrimination based on traits that are "inextricably bound up with sex."[147] Finally, Section II.C compares the opinions to draw some preliminary conclusions about *Bostock*'s significance.

### A. *Case Background*

On June 15, 2020, the Court issued an opinion in the consolidated cases of *Bostock v. Clayton County*; *Altitude Express, Inc. v. Zarda*; and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*.[148] In these cases, the Court sought to answer the question: Does Title VII of the Civil Rights Act of 1964's prohibition against sex-based employment discrimination cover discrimination based on an individual's sexual orientation and/or gender identity?[149] The three cases involved analogous fact patterns. Gerald Bostock, a child welfare advocate for Clayton County, was fired after his employer found out he was participating in a gay softball league.[150] In explaining the firing, the employer characterized Bostock's conduct as "unbecoming" of a county employee.[151] Donald Zarda was fired from his job as a skydiving instructor shortly after revealing that he was gay.[152] And Aimee Stephens, a funeral director who was assigned male at birth, was fired after writing a

145. See infra notes 204–207 and accompanying text.

146. See infra notes 204–207 and accompanying text.

147. Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020); see also infra note 177 and accompanying text.

148. *Bostock*, 140 S. Ct. at 1731, 1737–38.

149. See id. at 1737.

150. Id. at 1737–38.

151. Id. at 1738.

152. Id.

letter to her boss informing him she planned to begin living as a woman.[153] In each case, the reason for the firing was evident—the employee's sexual orientation or gender identity.[154] The only question was whether firing the employee for this reason violated the law.[155]

The Court held that Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on sexual orientation and gender identity.[156] Given the parties' agreement over the facts, the opinions largely ignored the specific cases and focused almost entirely on the law.[157]

The case resulted in three opinions. Justice Gorsuch wrote the majority opinion, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.[158] Justice Alito wrote a dissent on behalf of himself and Justice Thomas,[159] and Justice Kavanaugh wrote a separate dissent.[160] All three opinions self-identified as textualist[161] but came to different conclusions.[162] The rest of Part II focuses on Justice Gorsuch's majority and Justice Alito's dissent, as these opinions delve most deeply into sex discrimination jurisprudence.

### B. *Divergent Definitions of What It Means to Discriminate Because of Sex*

1. *Justice Gorsuch's Majority: Discrimination Based on Traits "Inextricably Bound Up With Sex".* — Justice Gorsuch's majority opinion asserts that under a "straightforward application" of Title VII's "legal terms with plain and settled meanings," it is clear that an employer who discriminates "against employees for being homosexual or transgender . . . necessarily and intentionally discriminates against that individual in part because of sex."[163] To arrive at this conclusion, Gorsuch uses a methodology he classifies as textualist—he frames the Court's role as interpreting only "the

153. Id.

154. Id. at 1737.

155. Id.

156. Id. at 1753–54.

157. See id. at 1737 ("Few facts are needed to appreciate the legal question we face.").

158. Id. at 1736.

159. Id. at 1754 (Alito, J., dissenting).

160. Id. at 1822 (Kavanaugh, J., dissenting).

161. See, e.g., id. at 1738 (majority opinion) (explaining that the majority's interpretation is based only on "the words on the page" of the statute, not any "extratextual sources"); id. at 1755 (Alito, J., dissenting) (accusing the majority of disingenuously "sail[ing] under a textualist flag" and asserting that his dissent is following textualism); id. at 1825–26 (Kavanaugh, J., dissenting) (distinguishing textualism from literalism and stating that the majority is following literalism while his dissent is following textualism).

162. For a thorough and thoughtful discussion of textualism in *Bostock*, see generally Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119.

163. *Bostock*, 140 S. Ct. at 1743–44.

words on the page," searching for the "ordinary public meaning of [a statute's] terms at the time of its enactment."[164] The opinion notably does not engage with some of the most prominent, nontextualist arguments in support of its holding—namely, that sexual orientation and gender identity discrimination constitute unlawful sex stereotyping and/or associational discrimination.[165] Instead, the majority focuses solely on the text,[166] employing a particular strand of logic-based textualism.[167]

The majority opinion's main focus is what it means to discriminate "because of . . . sex," seeking to make sense of the phrase as it is used in Title VII.[168] Gorsuch spends pages parsing the meaning of each word in the phrase,[169] demonstrating that the individual words' definitions are not really at issue. The definition of "sex," to which the parties conceded, is "biological distinctions between male and female."[170] Justice Alito's dissent acknowledges agreement among the Court on this definition.[171] Gorsuch states that the "ordinary meaning" of "because of" in a statute establishes a but-for causation standard, meaning that the action at issue would not have occurred but for the employee's sex.[172] Alito does not contest this in

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164. Id. at 1738.

165. See id. at 1763–65 (Alito, J., dissenting) (noting that these are two prominent arguments in support of the Court's holding and that the majority does not rely on these arguments). The plaintiffs' briefs and many amicus briefs made these arguments. See, e.g., Brief for Petitioner Gerald Lynn Bostock at 18–29, *Bostock*, 140 S. Ct. 1731 (No. 17-1618), 2019 WL 2763119; Opening Brief for Respondents Melissa Zarda, et al. at 23–36, *Bostock*, 140 S. Ct. 1731 (No. 17-1623), 2019 WL 2745391; Brief for Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil and Human Rights, and 57 Civil Rights Organizations as Amici Curiae Supporting the Employees at 29–33, 35–38, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107), 2019 WL 3023274; Brief of the National Women's Law Center and Other Women's Rights Groups as Amici Curiae in Support of the Employees at 17–29 & n.8, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107), 2019 U.S. S. Ct. Briefs LEXIS 2482.

166. Cf. *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation . . . .").

167. See, e.g., Ryan Anderson, Symposium: The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination, SCOTUSblog (June 16, 2020), https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination [https://perma.cc/DQ63-Y6FS] ("Gorsuch's argument rests on the logic of sex discrimination.").

168. *Bostock*, 140 S. Ct. at 1738 (quoting 42 U.S.C. § 2000e–2(a)(1) (2018)).

169. Id. at 1739–41.

170. Id. at 1739. But see Eskridge et al., supra note 11, at 1549–50 (arguing the majority did not actually stick to a definition of sex as biology).

171. *Bostock*, 140 S. Ct. at 1756 (Alito, J., dissenting) (stating that the majority "does not dispute" that sex in Title VII means "[o]ne of the two divisions of organisms formed on the distinction of male and female" (internal quotation marks omitted) (quoting the definition of "sex" in Webster's New International Dictionary (2d ed. 1953) (first definition))).

172. Id. at 1739 (majority opinion) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350, 360 (2013)). The Court also discusses how a 1991 amendment to Title VII

his dissent, though he does not find the standard of causation relevant to the central question of this case.[173] And "discriminate," defined in part by the statute, means "intentionally treat[ing] a person worse because of sex."[174] Once again, Alito does not seem to protest this definition.[175] The majority notes that neither the employers nor the dissenters are "suggesting that the statutory language bears some other meaning;" rather, they disagree on whether the statute applies in this case.[176] The lack of disagreement over the terms' definitions signals that it is not really textualism driving the opinions' polar opposition. Rather, the split is the result of differences in logic.

The real crux of Justice Gorsuch's opinion is his assertion about the logical inseparability of sexual orientation and gender identity from sex: In his words, "[H]omosexuality and transgender status are inextricably bound up with sex."[177] The rest of the opinion clarifies what Gorsuch means by "inextricably bound up": Because sexual orientation and gender identity are defined in relation to sex, they are logically inseparable. Although the majority does not define sexual orientation or gender identity, presumably finding it unnecessary because of universal agreement, Alito's dissent spells out these definitions: Sexual orientation is "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes,"[178] and a transgender person is "any individual who identifies with and adopts the gender role of a member of the other biological sex."[179] Both definitions rely, in part, on identifying the individual's sex.

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relaxed the causation standard, allowing "a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice." Id. at 1739–40 (citing Civil Rights Act of 1991 § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e–2(m)). The Court, however, proceeds with the more stringent but-for standard because "nothing in [its] analysis depends on the motivating factor test." Id. at 1740.

173. Id. at 1757, 1775 (Alito, J., dissenting). After acknowledging the Court's discussion of Title VII's causation standard, Justice Alito remarked "All that is true, but so what? . . . [T]he essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied." Id.

174. Id. at 1740 (majority opinion).

175. See id. at 1757, 1759 (Alito, J., dissenting) (agreeing that "Title VII protects individual rights, not group rights" and that "a disparate treatment case [under Title VII] requires proof of intent").

176. Id. at 1750 (majority opinion) (emphasis omitted).

177. Id. at 1742.

178. Id. at 1758 n.8 (Alito, J., dissenting) (alteration in original) (internal quotation marks omitted) (quoting the definition of "sexual orientation" in Webster's New College Dictionary (3d ed. 2008)).

179. Id. at 1758 n.9 (internal quotation marks omitted) (quoting 1 Benjamin James Sadock, Virginia Alcott Sadock & Pedro Ruiz, Comprehensive Textbook of Psychiatry 2063 (9th ed. 2009)).

This definitional relationship between sex, sexual orientation, and gender identity drives the Court's analysis and holding. The majority's discussion of but-for causation highlights the centrality of the traits' definitional connection: The majority breaks down the traits of homosexuality and transgender status into their component parts to prove that sex always plays a causal role in sexual orientation and gender identity discrimination.[180] The Court explains:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.[181]

These "two causal factors" correspond to the two elements of each trait's definition.[182] The Court relies on the definitions of sexual orientation and gender identity for its central finding that discrimination based on these traits necessarily involves sex discrimination in violation of Title VII. Thus, while these traits are not explicitly listed in the statute, they fall within Title VII's prohibition.

The majority opinion is replete with claims about the inherent logical connection between discrimination based on sexual orientation or gender identity and discrimination based on sex.[183] While recognizing "homosexuality and transgender status [as] distinct concepts from sex," the Court asserts that discrimination based on these traits "necessarily entails discrimination based on sex."[184] As Alito highlights,[185] the Court repeatedly uses "necessarily" and its synonyms in describing the relationship between sexual orientation and gender identity discrimination and sex discrimination.[186] "Necessarily" signifies a fundamental logical connection between

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180. Id. at 1742 (majority opinion).

181. Id.

182. See supra notes 178–179 and accompanying text.

183. While Justice Gorsuch does not discuss the role of comparators in defining illegal sex discrimination, he utilizes comparisons as a means of demonstrating that discrimination based on sexual orientation and/or gender identity is sex-based. See, e.g., *Bostock*, 140 S. Ct. at 1742 ("A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? . . . [T]he answer depends entirely on whether the model employee is a man or a woman."). There is no indication in this opinion, however, that a comparator is required to prove discrimination. Such a requirement would seem to run contrary to the opinion's reliance on self-contained logic (including principles and hypotheticals) to establish sex-based discrimination. See infra notes 188–198 and accompanying text.

184. *Bostock*, 140 S. Ct. at 1746–47.

185. Id. at 1758 (Alito, J., dissenting).

186. See, e.g., id. at 1737 (majority opinion) (stating that when an employer "fires an individual for being homosexual or transgender[,] . . . [s]ex plays a necessary and undis-

the distinct types of discrimination,[187] based on the definitional relationship between the protected trait and the traits at issue. The Court's holding is thus based equally on the text, which does not on its face answer the question of whether discrimination based on sexual orientation and gender identity are included in Title VII's prohibition, as on a logical analysis of what it really means to discriminate because of sex, sexual orientation, and gender identity.

The Court uses the definitional relationship to defeat one of the major arguments that Alito (and, more generally, those opposed to the Court's ruling) puts forward—that the discrimination at issue is *not* sex discrimination because an employer could, in theory, discriminate against a homosexual or transgender person without knowing that person's sex.[188] To combat this common argument, the Court considers an example of an employer whose applications ask only whether applicants are homosexual or transgender, redacting any other sex-identifying information, and who then refuses to hire homosexual or transgender applicants.[189] The Court contends that this practice would still constitute sex discrimination because "the individual applicant's sex still weighs as a factor in the employer's decision."[190] To prove this claim, the Court instructs:

> [I]magine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex.[191]

It is because of this inability to define "homosexual or transgender" without referencing sex that discrimination based on sexual orientation and gender identity necessarily involves sex discrimination. Without someone considering sex, be it the applicant or the employer, the employer would

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guisable role in the decision"); id. at 1741 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); id. at 1742 ("[S]ex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees . . . ."); id. at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."); id. at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex."); id. at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex . . . .").

187. See Necessarily, Merriam-Webster, https://www.merriam-webster.com/dictionary/necessarily [https://perma.cc/3H93-F6A7] (defining "necessarily" as something that occurs "as a logical result or consequence").

188. See *Bostock*, 140 S. Ct. at 1759 (Alito, J., dissenting).

189. Id. at 1746 (majority opinion).

190. Id.

191. Id.

not know against whom to discriminate. This basic, definitional connection drives the Court's holding.

The Court's discussion of past expansions of Title VII's definition of sex discrimination combined with its hypotheticals further demonstrate the holding's reliance on the traits' definitional relationship. While the Court does not explicitly acknowledge it, each example it offers for analogy or contrast hinges on whether or not the trait being discriminated upon is defined in relation to sex. Reviewing precedents that purportedly support its holding, the Court discusses cases in which courts identified as sex discrimination actions not previously considered as such:[192] refusal to hire based on motherhood and not fatherhood in *Phillips v. Martin Marietta Corp.*[193] and different mandatory pension contributions for men and women based on life expectancy in *City of Los Angeles Department of Water & Power v. Manhart*.[194] In each case, the relevant trait was defined, in the context of the actions at issue, in relation to sex—the *Phillips* employer focused on motherhood, meaning parenthood for women, and the *Manhart* employer considered life expectancy as defined by averages for men versus women.[195]

In arguing against a primary or sole causation standard, the Court again utilizes an example of discrimination based on a trait that is defined in relation to sex: the "trait of failing to conform to 1950s gender roles."[196] The Court explains that refusing to hire a male or female applicant for such a failure would be sex discrimination, even though this "trait" is distinct from the applicant's sex.[197] In this example, the secondary trait is definitionally related to sex—the relevant gender role against which the applicant is being compared is determined by the applicant's sex. The importance of the definitional link is further bolstered by the Court's examples of traits not protected by Title VII—tardiness, incompetence, and supporting the wrong sports team are all traits which have no definitional relationship to sex.[198] After considering all the Court's major examples, it becomes clear that the concern driving the Court's Title VII analysis is

192. Id. at 1743. The Court also discussed Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), which held that Title VII prohibited male-on-male sexual harassment, to highlight that laws are not restricted to "the principal evil Congress was concerned with when it enacted" the law. Id. at 1743–44 (quoting *Oncale*, 523 U.S. at 79). This point challenges a major argument in Justice Alito's dissent—that no one at the time of Title VII's enactment would have believed the law applied to discrimination based on sexual orientation or gender identity. Id. at 1755 (Alito, J., dissenting). The debate over the proper methodologies of statutory interpretation is beyond the scope of this Note.

193. 400 U.S. 542, 544 (1971) (per curiam).

194. 435 U.S. 702, 702 (1978).

195. See *Bostock*, 140 S. Ct. at 1743–44.

196. Id. at 1748.

197. Id. at 1748–49.

198. See id. at 1742.

whether the trait being discriminated upon is definitionally related to sex. Once the Court determined that sexual orientation and gender identity were defined in relation to (i.e., "inextricably bound up with"[199]) sex, it became necessarily true, under the Court's rationale, that discrimination based on these traits must violate Title VII.

2. *Justice Alito's Dissent: Discrimination Based on Sex Itself.* — Justice Alito, also pledging allegiance to textualism, reaches the opposite conclusion in a long and fiery dissent—he would have held that Title VII does not prohibit discrimination based on sexual orientation or gender identity.[200] The thrust of his argument is that textualism requires interpreting statutes according to their meaning to "ordinary people at the time of enactment"[201] and that doing so clearly reveals that "[t]he *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity."[202] As noted above, however, Alito does not present competing definitions for the terms in Title VII.[203] According to him, the reason he and the majority come to different conclusions is that the majority is really legislating from the bench under the guise of textualism.[204] But, upon closer look, the real reason for the split is a difference in framing.

The majority and Alito's dissent differ in how they frame the case's central question. Alito concentrates on whether sex is the same as sexual orientation or gender identity, and finds that it is not. The majority, in contrast, focuses on whether an employer could discriminate based on sexual orientation or gender identity without considering the target's sex, and finds that it could not. A difference in punctuation captures this core disconnect between the dissent and majority: Alito generally places only the term "sex" (as well as "sexual orientation" and gender identity") in quotation marks,[205] rather than the rest of the phrase (i.e., "because of . . . sex") as the majority frequently does.[206] While Alito builds his interpretation of

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199. Id.

200. Id. at 1755–56 (Alito, J., dissenting).

201. Id. at 1766.

202. Id. at 1767.

203. See supra notes 169–176 and accompanying text.

204. See *Bostock*, 140 S. Ct. at 1754–56 (Alito, J., dissenting).

205. See, e.g., id. at 1755 ("Title VII's prohibition of discrimination because of 'sex' still means what it has always meant."); id. at 1758 ("'Sex,' 'sexual orientation,' and 'gender identity' are different concepts . . . ."); id. at 1766 ("[D]iscrimination because of 'sex' was understood during the era when Title VII was enacted to refer to men and women.").

206. See, e.g., id. at 1738 (majority opinion) (first alteration in original) ("We must determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .'"); id. at 1750 (alterations in original) ("[T]he employers *agree* with our understanding of all the statutory language—'discriminate against any individual . . . because of such individual's . . . sex.'"); id. at 1753 ("The only question before us is whether an employer who fires someone

Title VII's prohibition on the definition of sex, Gorsuch centers not "just what 'sex' meant, but what Title VII says about it."[207] Based on this framing, Alito finds sexual orientation and gender identity discrimination to be outside of Title VII's scope.

Framing the inquiry in terms of the traits' definitions, Alito concludes that, because sexual orientation and gender identity are traits distinct from sex, discrimination based on them is separate from sex discrimination.[208] Reasoning from the lack of identity between the traits, he explains that "the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"[209] Because his analysis is focused on the definition of the traits themselves, his definition of sex discrimination simply involves placing the definition of sex after discrimination: "discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth."[210] Discrimination based on sexual orientation or gender identity, which he describes as discrimination because "that person is sexually attracted to members of the same sex or identifies as a member of a particular gender," falls outside this definition, and thus is not prohibited by Title VII.[211]

Rather than breaking down the traits into their definitional components as the majority does,[212] Alito treats homosexuality and transgender status as separate traits. For example, the majority poses a hypothetical in which a male and female employee are both attracted to men, but only the male employee is fired.[213] The majority offers this example as proof that the employee's sex is a but-for cause of his termination.[214] Alito challenges this conclusion, asserting that the employees actually "differ in two ways—sex and sexual orientation," so the example cannot demonstrate but-for causation.[215] By not addressing the definition of sexual orientation as sex-based, he can maintain the separation between the two traits, thus finding that this termination does not constitute sex discrimination. Alito describes the division between his opinion and the majority's as a "battle of labels," with Alito labeling the employer's motivation as the employee's sexual orientation while the majority labels it as attraction to men.[216] But a closer reading shows that the majority performs an extra level of

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simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

207. Id. at 1739.

208. Id. at 1757 (Alito, J., dissenting).

209. Id. at 1755.

210. Id. at 1756.

211. Id. at 1757.

212. See supra notes 180–182 and accompanying text.

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

214. Id.

215. Id. at 1762 (Alito, J., dissenting).

216. Id.

analysis—it delves into the definitional relationship between sex and sexual orientation, leading to its opposite conclusion.[217]

Justice Alito responds to the majority's definitional relationship argument, but fails to adequately engage with it and thus does not defeat it. He flatly rejects the majority's assertion that sexual orientation and gender identity discrimination are inherently sex-based: "[D]iscrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex . . . ."[218] To support this conclusion, he relies on the aforementioned hypothetical in which the employer's application asks only whether an applicant is homosexual or transgender, not for their sex.[219] Contrary to what the majority held, Alito states, "Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex."[220]

Alito's statement is true, but misses the majority's point—the key for finding a Title VII violation is not that the employer knew about the trait, but rather that it "intentionally set[] out a rule that makes hiring turn on sex."[221] While the employer may not know the individual applicant's sex, it is making a decision based on a trait that is defined in relation to sex.[222] Alito does not sufficiently address the fact that the employment decision still hinges on a sex-based trait.

The majority and Justice Alito's different approaches to the definitional argument reveal their opposing understandings of sex discrimination. Alito contrasts the majority's capacious definition, which includes discrimination based on traits that are "inextricably bound up with sex,"[223] with his narrow definition, which is restricted to only "discrimination because the person in question is biologically male or biologically female."[224] He claims that the majority's more expansive definition "effectively amends the statutory text" because Title VII only bars discrimination based on "*sex itself*, not everything that is related to, based on, or defined with reference to, 'sex.'"[225] But sexual orientation and gender identity are not merely "defined with reference to" sex—one of the core definitional components of each term is sex.[226] Alito thus does not sufficiently address the fundamental connection between sex, sexual orientation, and gender

217. See supra notes 177–182 and accompanying text.
218. *Bostock*, 140 S. Ct. at 1759 (Alito, J., dissenting).
219. See supra notes 188–191 and accompanying text.
220. *Bostock*, 140 S. Ct. at 1760 (Alito, J., dissenting).
221. Id. at 1746 (majority opinion).
222. See supra notes 188–191 and accompanying text.
223. *Bostock*, 140 S. Ct. at 1742.
224. Id. at 1757 (Alito, J., dissenting).
225. Id. at 1761.
226. See supra notes 177–179 and accompanying text.

identity, undermining his conclusion that discrimination on these bases are wholly distinct.

### C. *Takeaway: Different Questions, Different Answers*

A close reading of these two opinions demonstrates a fundamental schism over the meaning of sex discrimination stemming from wholly different framing of the case's key question. Comparing the opinions reaffirms a central takeaway from the case—the majority's definition of sex discrimination under Title VII includes discrimination based on traits that are "inextricably bound up with sex."[227]

Abstracting from *Bostock*'s specific holding, the majority opinion defines sex-based discrimination as discrimination on any basis that is so intimately tied up with sex that one cannot realistically consider that trait without considering sex. Justice Alito's dissent was right—an employer could, in theory, discriminate on the basis of sexual orientation or gender identity without knowing the employee's sex.[228] The Court, however, did not concentrate on whether or not the employer had such knowledge; instead, it focused on the definitional connection between sexual orientation, gender identity, and sex. Because these concepts are defined in relation to sex, it does not matter that one could theoretically consider them without knowing an individual's sex—discrimination based on sexual orientation or gender identity is discrimination based on a factor defined in relation to sex, thus making it sex-based discrimination.

## III. THE NEW SEX DISCRIMINATION: AFTER *BOSTOCK*

This Part argues that *Bostock* should be understood as fundamentally redefining what it means to discriminate on the basis of sex under the Equal Protection Clause. By including discrimination based on traits that are "inextricably bound up with sex,"[229] the Court expanded the legal definition of sex discrimination and with it the types of discrimination that the law can remedy. This redefinition offers a pathway out of the muddled sex discrimination jurisprudence outlined in Part I that can both clarify how the law defines sex discrimination and increase the law's ability to eradicate sex discrimination in all its forms. Under this new definition, discrimination based on traits which had previously been deemed other than sex—i.e., laws discriminating on the basis of pregnancy or restricting reproductive choice—should be considered forms of sex-based discrimination.

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227. *Bostock*, 140 S. Ct. at 1742.

228. See supra notes 219–220 and accompanying text.

229. *Bostock*, 140 S. Ct. at 1742.

### A. *Applications of* Bostock *Thus Far*

1. Bostock *and Federal Civil Rights Laws.* — It is highly likely that the *Bostock* decision will have far-reaching consequences in other areas of antidiscrimination law. While the majority insisted that the decision was limited to the Title VII context,[230] the opinion's rationale did not depend on the employment context for its finding that discrimination based on sexual orientation and gender identity is necessarily discrimination based on sex.[231] Rather, the logic relied only on the definition of the statute's terms—terms that are present throughout antidiscrimination laws.[232] The extension of *Bostock*'s reasoning to other similarly structured laws thus seems inevitable. This apparent inevitability helps explain the spate of commentary on the potential implications of *Bostock* in health care, schools, housing, and more.[233] Indeed, Justice Alito noted in his dissent

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230. Id. at 1753 ("The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination . . . . But none of these other laws are before us . . . and we do not prejudge any such question today.").

231. See supra section II.B.

232. See, e.g., Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2018) (making it unlawful for "any creditor to discriminate against any applicant . . . on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)"); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018) ("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 . . . ."); Fair Housing Act, 42 U.S.C. § 3604 (2018) (making it unlawful to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin"). For a comprehensive list of federal statutes prohibiting sex discrimination, see *Bostock*, 140 S. Ct. at app. C (Alito, J., dissenting).

233. See, e.g., Rigel C. Oliveri, Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After *Bostock v. Clayton County*, 69 U. Kan. L. Rev. 409, 409 (2021) ("[T]he federal Fair Housing Act (FHA), which has identical language prohibiting discrimination in housing 'because of . . . sex,' should [after *Bostock*] be interpreted to prohibit discrimination based on sexual orientation and gender identity. This is an obvious next step given the similar language, structure, and purpose of both statutes . . . ."); David Cole & Ria Tabacco Mar, Opinion, The Court Just Teed Up LGBTQ Protections for So Much More Than Employment, Wash. Post (June 18, 2020), https://www.washingtonpost.com/opinions/the-court-just-teed-up-lgbtq-protections-for-so-much-more-than-employment/2020/06/18/725f7832-b0dc-11ea-8f56-63f38c990077_story.html (on file with the *Columbia Law Review*) (arguing that *Bostock*'s "reasoning—that discrimination because of LGBTQ status is necessarily a form of discrimination 'because of sex'"—means that all civil rights laws with similar language "apply fully to LGBTQ individuals"); Letter From LGBTQ Rights Organizations to William Barr, Att'y Gen., DOJ, at 1 (July 16, 2020), https://assets2.hrc.org/files/assets/resources/DOJ-BostockEnforcement-Letter-07162020.pdf [https://perma.cc/2MJ4-YP8L] ("The Supreme Court's analysis of what constitutes discrimination on the basis of sex relied on a textual reading that applies with equal force to other statutory prohibitions of sex discrimination."); Rina Grassotti & Sheila M. Willis, What the Supreme Court's LGBTQ Decision May Mean for Bathroom and Locker Room Access in Title IX Schools: A 4-Step Best Practices Guide, Fisher Phillips (July 15, 2020), https://www.fisherphillips.com/

that the decision is "virtually certain to have far-reaching consequences" on the "[over] 100 federal statutes prohibit[ing] discrimination because of sex."[234]

Several federal and state courts have already interpreted *Bostock*'s holding in the context of Title IX, specifically in cases where a transgender student has claimed their school is violating Title IX or the Equal Protection Clause by prohibiting them from using a bathroom consistent with their gender identity.[235] While Justice Gorsuch specifically noted that *Bostock* did not decide whether this sort of bathroom policy would violate Title VII or other laws,[236] these courts have looked to the reasoning of

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resources-alerts-what-the-supreme-courts-lgbtq-decision-may [https://perma.cc/N3A4-R7YV] ("Commentators and practitioners . . . are unsure as to how the *Bostock* decision could *not* help but address bathrooms, locker rooms, or anything else of the kind where the definition of 'sex' is at issue."); Katie Keith, What the Supreme Court's *Bostock* Decision Means for LGBTQ Health Care, McCourt Sch. of Pub. Pol'y (June 30, 2020), https://mccourt.georgetown.edu/news/what-the-scotus-bostock-decision-means-for-lgbtq-health-care/ [https://perma.cc/LE53-DDRT] (asserting that the "*Bostock* confirms . . . that LGBTQ people are protected from discrimination in health insurance and health care under the Affordable Care Act"); Julie Moreau, Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say, NBC News (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/7UU7-M4ZEf] (quoting a legal expert who said that *Bostock* will have implications on "housing, education, credit, health care and beyond that as well").

234. *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting).

235. See Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021); Adams ex rel. Kasper v. Sch. Bd., 968 F.3d 1286, 1291 (11th Cir. 2020), opinion vacated and superseded sub nom. Adams v. Sch. Bd., 3 F.4th 1299 (11th Cir. 2021), reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021); Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 40 (D.D.C. 2020) (noting "*Bostock*'s clear import for the meaning of discrimination based on sex under Title IX"); Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 351 (Nev. 2020) ("Applying *Bostock*'s reasoning to the analogous language in Title IX prohibiting harassment 'on the basis of sex,' we first conclude sufficient facts support a claim under Title IX.").

236. *Bostock*, 140 S. Ct. at 1753. In rejecting the employers' arguments, Justice Gorsuch asserted that the decision did not create the parade of horribles that the employers claimed it would:

> What are these consequences [of this decision] anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.

Id. Justice Alito aligned with the employers, calling the majority's "refusal to consider the consequences of its reasoning," including on bathrooms, "irresponsible." Id. at 1778 (Alito, J., dissenting).

*Bostock* for guidance on determining whether such policies discriminate because of sex.

The Fourth Circuit recently ruled on Gavin Grimm's well-known case challenging, inter alia, his school's refusal to let him use the bathroom consistent with his gender identity.[237] The court found that this policy violated both equal protection and Title IX,[238] but the court only referenced *Bostock* in the Title IX discussion.[239] After explaining that rulings on Title VII guide the court's Title IX decisions,[240] the court stated that, under *Bostock*, "discrimination against a person for being transgender is discrimination 'on the basis of sex'" because "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender."[241] Based on this understanding, the court said it had "little difficulty holding that a bathroom policy precluding Grimm from using the boys['] restrooms discriminated against him 'on the basis of sex'" under Title IX.[242] In an opinion concurring in the denial of rehearing en banc, one judge said that after the *Bostock* decision, "holding that discrimination against a transgender person is necessarily a form of sex-based discrimination, there is no question that the Board's policy prohibiting Grimm from using the boys' bathrooms discriminated against him on the basis of sex."[243]

A split Eleventh Circuit panel also found that a similar bathroom policy violated both equal protection and Title IX.[244] In addition to relying on the circuit's own case law, the court said its analysis "benefit[ted]" from the recent ruling in *Bostock*, using *Bostock*'s "guidance" to find that the policy violated Title IX.[245] While the Eleventh Circuit subsequently vacated this decision and will rehear the case en banc,[246] the analysis provides insight into how judges are grappling with *Bostock*'s implications in contexts outside of employment.

2. Bostock *and the Constitution.* — The *Bostock* decision is also likely to have implications for constitutional sex discrimination jurisprudence. Many commentators have discussed the ways in which *Bostock* will impact

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237. *Grimm*, 972 F.3d at 593.

238. Id. at 593–94.

239. Id. at 616–19.

240. Id. at 616 ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX.").

241. Id.

242. Id.

243. Grimm v. Gloucester Cnty. Sch. Bd., 976 F.3d 399, 402 (4th Cir. 2020) (order denying petition for rehearing en banc) (Wynn, J., concurring).

244. Adams ex rel. Kasper v. Sch. Bd., 968 F.3d 1286, 1292 (11th Cir. 2020), opinion vacated and superseded sub nom. Adams v. Sch. Bd., 3 F.4th 1299 (11th Cir. 2021), reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021).

245. Id. at 1304, 1305.

246. See *Adams*, 9 F.4th at 1372.

LGBTQ rights under the Equal Protection Clause, likely laying the foundation to subject LGBTQ-discriminatory laws to intermediate scrutiny.[247] With the same traits at play, logical consistency would require the Court to recognize discrimination on the basis of sexual orientation and gender identity as sex-based discrimination under the Equal Protection Clause as well.

Little has been written on what *Bostock* means for other areas of sex discrimination that have been traditionally excluded from equal protection scrutiny. While Title VII and the Equal Protection Clause are distinct sources of law and certainly not coextensive, the case law under each category has greatly influenced the other.[248] Thus, it is plausible that *Bostock*

247. See, e.g., Corbin Carter & Michael S. Arnold, Supreme Court Rules That Title VII Protects LGBTQ Employees, Mintz (June 16, 2020), https://www.mintz.com/insights-center/viewpoints/2226/2020-06-16-supreme-court-rules-title-vii-protects-lgbtq-employees [https://perma.cc/M8BS-3HPN] (listing among *Bostock*'s potential implications "[t]he impact of a broad definition of 'sex' on 14th Amendment Equal Protection Clause claims (e.g. will policies addressing sexual orientation and transgender status be subjected to the 'heightened' standard of constitutional review used to examine sex-based claims?)"); 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/A9K2-2F8D] ("An extension of the Supreme Court's finding in *Bostock* that sex necessarily includes sexual orientation and gender identity could also mean, then, that laws that target people based on sexual orientation or gender identity could be subject to heightened scrutiny."); A Q&A With Professor Eskridge on Landmark SCOTUS Decision on LGBTQ Rights, Yale L. Sch. (June 16, 2020), https://law.yale.edu/yls-today/news/qa-professor-eskridge-landmark-scotus-decision-lgbtq-rights [https://perma.cc/7S2M-7DNW] [hereinafter Q&A with Professor Eskridge] ("[T]he statutory ruling will have constitutional echoes . . . . The Court has not said exactly what level of scrutiny should apply to state action harming sex and gender minorities—but after *Bostock* one must assume that heightened scrutiny applies.").

248. See, e.g., Taylor Flynn, Federal Equal Protection, *in* Gender Identity & Sexual Orientation Discrimination in the Workplace: A Practical Guide 15-1, 15-4 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) (on file with the *Columbia Law Review*) ("Because sex discrimination is prohibited under Title VII and the Constitution, federal courts have relied on reasoning in the former context when analyzing the latter, and vice versa."); id. at 15-4 n.15 (citing cases in which courts have mixed-and-matched rationales from the Title VII and equal protection contexts); Cheryl I. Harris, Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection, 2014 U. Chi. Legal F. 95, 98–99 (explaining that "there is a good deal of transference" between "Title VII and equal protection standards for establishing discrimination and assessing remedies," and that "over time aspects of equal protection analysis have been imported into the Title VII cases and vice versa"). Federal courts' analysis of disparate treatment sex discrimination claims under the Equal Protection Clause often mirrors Title VII analysis. See, e.g., Naumovski v. Norris, 934 F.3d 200, 212 (2d Cir. 2019) (stating that equal protection "discrimination claims parallel Title VII discrimination claims in many respects"). The two major differences between the causes of actions—(1) disparate impact claims only exist under Title VII, see supra note 21, and (2) equal protection claims require state action, see Chemerinsky, 6th ed., supra note 18, at 553—do not impact this Note's argument, since *Bostock*'s definition of sex discrimination does not involve either.

will influence equal protection jurisprudence despite the holding's technical limitation to Title VII.[249] This is all the more likely given the decision's grounding in the logic of sex discrimination, rather than the facts of the cases, employment context, or any unique text in Title VII.[250] Because the opinion relied on definitions and abstract logic for its holding, its rationale applies with equal force to sex discrimination under the Equal Protection Clause.

### B. *Potential Future Applications of* Bostock

*Bostock*'s expanded definition of sex discrimination undermines the logic of earlier decisions ruling pregnancy and reproductive choice outside the scope of the Equal Protection Clause. Examining these prior cases through the lens of *Bostock* reveals how *Bostock* displaces their narrower definition of sex discrimination. By defining sex discrimination to include discrimination based on traits that are "inextricably bound up with sex,"[251] *Bostock* laid the foundation for subjecting laws regulating pregnancy and reproductive choice to intermediate scrutiny. This move would not only

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249. See Bostock v. Clayton County, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) ("[D]espite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases."); Erwin Chemerinsky, Chemerinsky: Gorsuch Wrote His 'Most Important Opinion' in SCOTUS Ruling Protecting LGBTQ Workers, ABA J. (July 1, 2020), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion [https://perma.cc/4K4G-L9YY] ("[T]here seems to be little basis for [distinguishing between *Bostock*'s application to the equal protection and Title VII contexts] once the court held that a prohibition against sex discrimination includes outlawing discrimination based on sexual orientation and gender identity."); Q&A with Professor Eskridge, supra note 247 (asserting that "the statutory ruling will have constitutional echoes" and discussing the potential impact of *Bostock* on equal protection jurisprudence). Some courts have already begun citing *Bostock* when deciding equal protection claims. For instance, the North Carolina Supreme Court relied on *Bostock*'s definition of sex discrimination to determine that a law restricting issuance of domestic violence protection orders to people in relationships with the "opposite sex" violated the Equal Protection Clause. M.E. v. T.J., 854 S.E.2d 74, 108–11 (N.C. 2020). The court stated:

> Although in *Bostock* the Court was construing a statute, its definitions and analysis are relevant to . . . equal protection claims . . . .
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> . . . .
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> . . . Though *Bostock* was decided by statutory interpretation of certain language in Title VII, the reasoning in *Bostock* in support of its determination, that "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex*[,]" includes a common, plain language definition of "sex" in the context of discrimination that . . . must logically include sexual-orientation and gender identity.

Id. (alteration in original).

250. See supra section II.B.1.

251. *Bostock*, 140 S. Ct. at 1742.

represent a symbolic victory for legal feminists; it could also have significant practical implications. Utilizing *Bostock*'s definition of sex discrimination in these areas would help courts and legal practitioners navigate out of the "real" differences conundrum[252] by focusing on whether the trait at issue is defined in relation to sex, rather than whether or not it is unique to one sex or based on physical differences between the sexes. Further, subjecting laws regulating reproductive capacity to the "exceedingly persuasive justification" standard, and with it equal protection's anti-stereotyping history, could lead to a more rigorous look at the social implications of these laws.[253]

1. *Redefining* Geduldig*: The Trait of Pregnancy Is "Inextricably Bound Up With Sex".* — While the Supreme Court rejected the claim that pregnancy discrimination constitutes sex discrimination under the Equal Protection Clause in *Geduldig*,[254] pregnancy discrimination falls squarely under *Bostock*'s definition of sex discrimination. The trait of being pregnant is inextricably bound up with sex, so discrimination based on pregnancy is sex discrimination, and laws regulating pregnancy should be subject to intermediate scrutiny. While the PDA can likely provide relief for most instances of pregnancy discrimination, *Bostock* can supplement the statute by providing a path to relief in areas other than employment. In fact, some are already deploying *Bostock* to support the proposition that pregnancy discrimination is sex discrimination.[255]

This analysis conforms with feminist scholars' conception of sex discrimination evident in their critiques of *Geduldig*. For instance, Professor Reva Siegel once offered a similar suggestion for the route the Court should have taken in that case: "The Court might easily have characterized the disability insurance program challenged in *Geduldig* as sex-based on the grounds that . . . it discriminates between those employees who have the capacity to gestate and those who do not."[256] Rather than focusing on the sex makeup of the groups into which the policy divided employees, as the *Geduldig* Court did,[257] a Court using *Bostock*'s definition of sex discrim-

252. See supra section I.A.2.

253. See supra notes 112–118, 138–141 and accompanying text for scholars making similar arguments.

254. See supra notes 98–102 and accompanying text.

255. See, e.g., Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents at 4–5 n.5, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. filed Sept. 20, 2021), 2021 WL 4340072 [hereinafter *Dobbs* Brief of Equal Protection Constitutional Law Scholars] (invoking *Bostock* as supporting by analogy the statement, "Laws that discriminate on the basis of pregnancy can involve various forms of sex-based discrimination, as this Court has acknowledged").

256. Siegel, Reasoning From the Body, supra note 31, at 269 n.24.

257. See supra section I.C.1.

ination would recognize that the policy constituted an employment decision based on a trait that is definitionally linked to sex, thus triggering equal protection intermediate scrutiny.

2. *Redefining* Roe*: The Trait of Seeking an Abortion Is "Inextricably Bound Up With Sex".* — Implementing the equal protection analysis feminist legal scholars have long sought,[258] *Bostock*'s definition of sex discrimination would require equal protection analysis of abortion regulations as sex-based state action. The trait of seeking an abortion is inextricably bound up with sex, so laws restricting access to abortion are sex discrimination. Unlike the Court's opinions that claimed laws and actions impeding access to abortion were not sex-based,[259] analyzing abortion regulations under *Bostock*'s definition of sex discrimination would acknowledge that these regulations target people based on a trait that is defined by sex. Such regulations would thus be subject to intermediate scrutiny.

This application of *Bostock* is particularly salient as it becomes increasingly likely that the Supreme Court will overturn *Roe*.[260] With the Court poised to severely curtail or even eliminate protections for reproductive rights under the Due Process Clause, some pro-choice advocates are turning to the Equal Protection Clause as an alternative route to protection.[261] And in *Dobbs v. Jackson Women's Health Organization*, the case currently before the Court directly asking the Court to overturn *Roe*,[262] one pro-choice amicus brief specifically invoked *Bostock*'s definition of sex discrimination to argue that abortion restrictions are a form of sex discrimination.[263]

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258. See supra notes 138–141 and accompanying text; see also Kimberly M. Mutcherson, Rewritten Opinion *Roe v. Wade*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court, supra note 113, at 151–67 (writing a fictional concurrence in *Roe* based on an equal protection analysis of abortion restrictions).

259. See supra section I.C.2.

260. See, e.g., Erwin Chemerinsky, *Roe v. Wade* Hasn't Been Overturned. The Rule of Law Might Have Been., Wash. Post (Sept. 2, 2021), https://www.washingtonpost.com/outlook/2021/09/02/roe-overturn-texas-constitution/ (on file with the *Columbia Law Review*) ("The Supreme Court can, and probably will, overturn *Roe v. Wade*."); Matt Ford, The Supreme Court Will Overturn *Roe v. Wade*, New Republic (Dec. 1, 2021), https://newrepublic.com/article/164575/supreme-court-will-overturn-roe [https://perma.cc/4GSH-KCF4] ("Five justices effectively signaled in oral arguments in *Dobbs v. Jackson Women's Health Organization* that they would be willing to overturn *Roe* and *Casey*.").

261. See, e.g., *Dobbs* Brief of Equal Protection Constitutional Law Scholars, supra note 255, at 2 ("[T]he Equal Protection Clause supplies an additional, independent basis for the constitutional right to an abortion . . . .").

262. See Brief for Petitioners at 14, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. filed July 22, 2021) ("This Court should overrule *Roe* and *Casey*.").

263. See Brief for LGBTQ Organizations and Advocates as Amici Curiae in Support of Respondents at 33–34, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. filed Sept. 2021), 2021 WL 4341887 ("By [*Bostock*'s] logic, laws that restrict abortion also facially discriminate based on sex. Like being LGBTQ, pregnancy is a sex-based characteristic; it is 'inextricably bound up with' an individual's sex." (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020))).

While it is unclear whether the Court will embrace such arguments, one way to strengthen them is to situate them within the Court's recent jurisprudence.[264]

3. Bostock*'s Limits.* — This Note explores strategies for using *Bostock* to promote sex and gender equality. It seeks to leverage this momentous ruling, accepting as its premise the majority's rationale. Ever since the opinion's publication, a cascade of commentators has debated whether the majority's choice of rationale will help to advance sex and gender equality. Some have argued that the majority's textualist approach is well suited for widespread application,[265] while others think this reasoning was overly narrow and might restrict the case's impact.[266] It remains unclear whether *Bostock*'s rationale is amenable to a radical rethinking of sex discrimination jurisprudence, including rejecting a legal definition of sex as binary and biological, reevaluating sex differentiations previously accepted as "real," and expanding the law's ability to prohibit all forms of sex- and gender-based discrimination.[267] This Note proposes a path forward in the world as it is. The author continues to advocate for the world as it should be—a world in which the law's treatment of sex and gender facilitates all people's ability to live life as their authentic selves.

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264. For a discussion of how *Bostock* supports a pro-choice ruling in *Dobbs*, see Marc Spindelman, Justice Gorsuch's Choice: From *Bostock v. Clayton County* to *Dobbs v. Jackson Women's Health Organization*, 13 ConLawNOW 11, 14–19 (2021).

265. See, e.g., Naomi Schoenbaum, The New Law of Gender Nonconformity, 105 Minn. L. Rev. 831, 834, 836 (2020) (praising *Bostock* for vindicating transgender rights "without relying on the gender nonconformity theory," rather than "reify[ing] transgender persons' birth-designated sex as their legal sex" by "treating transgender persons as gender nonconformers"); Rachel Slepoi, Essay, *Bostock*'s Inclusive Queer Frame, 107 Va. L. Rev. Online 67, 78 (2021) (celebrating *Bostock*'s textual logic for "acknowledg[ing] how sex discrimination truly works" by recognizing that "[s]ex stereotyping is per se 'because of sex'" and "anti-queer discrimination is per se sex stereotyping").

266. See, e.g., Eskridge et al., supra note 11, at 1549 (criticizing the majority opinion for evading the "more socially controversial issues about the meaning of sex and the evolving status of gay men, lesbians, and transgender persons" by stipulating to a biological definition of sex).

267. See generally Melina Constantine Bell, Gender Essentialism and American Law: Why and How to Sever the Connection, 23 Duke J. Gender L. & Pol'y 163, 171 (2016) (arguing that "binary gender—and even binary sex to some extent—are socially constructed by institutions such as law and medicine" and showing "how the legal system can gradually relinquish its role in creating, maintaining, and enforcing a gender system"); David Fontana & Naomi Schoenbaum, Unsexing Pregnancy, 119 Colum. L. Rev. 309, 311–14 (2019) (advocating extending pregnancy protections and benefits to non-women caregivers in order to disaggregate sex from pregnancy-related carework); Maayan Sudai, Toward a Functional Analysis of Sex in Federal Antidiscrimination Law, 42 Harv. J.L. & Gender 421, 423 (2019) ("[B]oth conservative and progressive interpretations [of 'sex' in the law] should be rejected in favor of a functional analysis of 'sex' that focuses on what 'sex' *does* rather than what it *is*.").

## CONCLUSION

This Note demonstrates how, by fundamentally redefining sex discrimination to include discrimination based on any characteristic that is definitionally related to sex, *Bostock* could have a widespread impact well beyond Title VII. This new definition could help to implement a vision of equal protection for which legal feminists have long advocated and expand public understanding of sex discrimination and equality. Further, as *Roe* hangs in the balance, this Note seeks to illuminate an alternative route to protecting fundamental rights that has a strong basis in modern constitutional jurisprudence. This Note can guide litigators and advocacy groups seeking to fortify and expand civil rights protections by providing the basis for new, creative arguments for equality.