BOSTOCK AND THE TEXTUALIST ILLUSION: A HOLISTIC SOLUTION TO THE COURT'S PATCHWORK APPROACH

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I. INTRODUCTION

This Article examines the Supreme Court's decision in *Bostock v. Clayton County* and its implications for transgender employment rights under Title VII of the Civil Rights Act. In *Bostock*, the majority adopted a literalist statutory interpretation, concluding that discrimination against transgender and gay employees necessarily constitutes sex discrimination. While this reasoning has been celebrated for expanding workplace protections, this Article argues that *Bostock* makes a fundamental category error by conflating "sex" with sexual orientation and gender identity.

The consequences of *Bostock's* Title VII interpretation are far reaching. Because Title VII was not designed with the needs of transgendered individuals in mind, merely including them under the definition of "sex" results in a patchwork solution that ignores the unique needs of transgender individuals. Furthermore, this interpretation creates ambiguities for employers. And the Court's departure from textualist principles in favor of a literalist approach creates confusion regarding established principles of judicial interpretation. Finally, because transgender identity is rooted in internal gender perception, it is more closely aligned with the protected classes of religion and disability than it is the category of sex.

As a solution, this Article proposes that if transgendered individuals need additional, unique workplace protections, the proper avenue for doing so would be to create a distinct protected class under employment discrimination law. This ensures clear legal standards, a balanced approach to accommodating transgender employees while maintaining workplace stability, and the engagement of the political branches of government in what is a divisive public policy issue. In doing so, this Article provides a valuable framework for critiquing Title VII interpretation jurisprudence, for addressing the unique needs of transgender individuals, and for whether the judiciary or the legislature is the proper adjudicator.

II. BOSTOCK'S INTERPRETATION OF TITLE VII

The Supreme Court's landmark, 2020 decision in *Bostock v. Clayton County* involves three separately filed cases.[1] Gerald Bostock sued Clayton County, Georgia, under Title VII of the Civil Rights Act of 1964 on a theory of sexual orientation discrimination after he was fired for promoting his gay softball league at work.[2] Another plaintiff in *Bostock* was Donald Zarda, a skydiving instructor who sued his private-sector employer after he was fired for being gay.[3] The final plaintiff in *Bostock*

1. Bostock v. Clayton Cty., 590 U.S. 644, (2020) (majority opinion).
2. *Id.* at 653.
3. *Id.*

was Aimee Stephens who was fired from a funeral home.[4] While employed with the funeral home, Aimee was diagnosed with gender dysphoria and as a result explained to her employer that she was going to "live and work full-time as a woman."[5] The funeral home then fired her.[6] The Supreme Court granted certiorari to address whether protections against "sex" discrimination under Title VII includes discrimination based on sexual orientation and gender identity.[7]

In a 6–3 opinion, the Supreme Court ruled in favor of the plaintiffs.[8] The majority opinion written by Justice Gorsuch employs a very literal statutory interpretation to reach this decision. Gorsuch reasoned that the language of Title VII, "because of . . . sex" is rather clear and that the Court need only determine the ordinary public meaning of this language."[9] To ascertain this ordinary meaning, Gorsuch essentially relies on the text of the statute itself, dictionary definitions, and some prior case precedents.[10]

A. The Majority Opinion Reasoning

The Court employed a rather simple process to arrive at their decision. First, they defined the term "sex" from the statute.[11] In keeping with the theme of simplicity, the Court does not define "sex" based on esoteric definitions that employ complex definitions to distinguish them from biology.[12] Instead, the Court adopts the definition offered by the employer defendants that "sex" is simply "status as either male or female [as] determined by reproductive biology."[13] But at the same time, the Court does not limit itself to a strict definition for "sex"; it does not demand that Title VII is excluded from covering discrimination based upon sexual orientation or transgender status.[14]

Next, the majority opinion from the Court addresses Title VII's causation standard found in the phrase "because of."[15] The Court again applies a simple, plain meaning to reach the conclusion that, as held in

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4. *Id.* at 653–54.
5. *Id.* at 654.
6. *Id.*
7. *Id*.
8. *Id*. at 644.
9. *Id.* at 655 ("We must determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'") (internal citations omitted).
10. *Id.* at 662 ("At bottom, these cases involve no more than straight-forward application of legal terms with plain and settled meaning.").
11. *Id.* at 654–655.
12. *Id.* at 654.
13. *Id.* at 655.
14. *Id.* at 655.
15. *Id.* at 656.

prior precedent, this language creates a standard "but for" causation standard.[16] This requires the Court to find nothing more than that "a particular outcome would not have happened 'but for' the purported cause."[17] In this Court's reasoning, this means that if all variables in the facts are held constant other than a change in the variable of "sex," if this changes the outcome then sex is a "but for" cause of the outcome.[18]

Finally, the Court defines another term by addressing what "discriminate" means in Title VII.[19] Here, the Court again relies on a straightforward definition, this time found in the 1954 Webster's Dictionary, "to make a difference in treatment or favor (of one as compared with others)."[20] Using this definition leads the Court to conclude that, as it pertains to Title VII, "discrimination" simply means treating an individual worse than someone else based upon the individual's membership in a protected class.[21] There is potentially a categorical definition of "discriminate" which refers to treating one group different than another group.[22] However, due to the explicit focus on discriminating against "individuals" in the text of Title VII, the Court rejects this as a possible interpretation in the present case.[23] This decision regarding competing definitions of "discriminate" plays a key role in the ultimate determination of the case. And this distinction undermines the logic from prior appellate cases upholding sex differentiated appearance standards.[24]

The Court then employs these definitions to create a very literal interpretation of Title VII by explaining, "So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."[25]

Applying this literal interpretation to the three plaintiffs in *Bostock*, it is easy for the Court to conclude that firing an employee for being homosexual or transgender violates Title VII.[26] The reasoning here is

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16. *Id.*

17. *Id.*

18. *Id.* ("In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

19. *Id.* at 657.

20. *Id.* (internal citations omitted).

21. *Id.*

22. *Id.* at 657-58.

23. *Id.* at 658.

24. *See infra* Part IV.

25. *Bostock*, 590 U.S. at 658.

26. *Id.* at 660. ("The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against a person for being homosexual or transgender without discriminating against that individual based on sex.").

that because it is impossible for an employer to discriminate against a transgender or homosexual employee without knowing the employee's sex, any such negative employer action against that employee based upon their transgender or homosexual status is necessarily "because of . . . sex," and thus a violation of Title VII.[27] The Court further illustrates with an example: "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired?"[28] The Court goes on to explain that this question is impossible to answer without knowing the sex of the employee.[29] If the employee is a male, the employer's policy has not been violated. But if the employee is female, the employer's policy has been violated. Therefore, the outcome is contingent solely on the employee's sex, which means that the employer's policy is discrimination "because of . . . sex" under Title VII.[30]

However, this example provided in the majority opinion was criticized in the dissent, which attempted to demonstrate that sexual orientation and gender identity discrimination are not necessarily discrimination "because of . . . sex." This is because, while it is necessary to have knowledge of one's sex in order to discriminate against them for being either transgender or homosexual, an argument could be made that the primary driver of the discrimination is nevertheless sexual orientation or gender identity. Justice Alito in his dissent attempts to illustrate this principle and rebut the claims of the majority opinion by building upon the majority's example and asking the reader to imagine the following four model employees come to the above-referenced party:

- Employee A with husband
- Employee B with husband
- Employee C with wife
- Employee D with wife[31]

Which of these employees have violated the policy against homosexuality and will therefore be fired? As in the example provided by Gorsuch in the majority opinion, it is impossible to know without first

27. *Id.*

28. *Id.* at 661–62.

29. *Id.* at 662 ("If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.").

30. *Id.*

31. *Id.* at 698 (Alito, J., dissenting) (While the example in this Article is worded slightly differently than Justice Alito's for clarify, the logical argument is the same).

ascertaining the sexes of the employees. However, if Employee A is a man and Employee C is a woman, they will both be fired. Likewise, if Employee B is a woman and Employee D is a man, then they would not be fired. Therefore, Alito argues in dissent, biological sex cannot be the cause regarding who gets fired.[32] The common determinant in the employees who were fired, and thus the "but for" cause, is attraction to the same sex, not their biological sex.[33] And because sexual orientation is a separate and distinct class of individual that is not included as a protected class in Title VII, discrimination based on this classification is not actionable under Title VII.[34]

Justice Kavanaugh's dissent provides a slightly different example that illustrates the same point.[35] He imagines an employer with four employees—a straight man, a straight woman, a gay man, and a lesbian.[36] He then invites the reader to imagine that, due to financial reasons, the employer must fire two of these employees.[37] If the employer were to make this decision based on a desire to discriminate against women—discrimination based on sex—then he would fire the two women.[38] And if the employer were to make the decision based on a desire to discriminate against homosexuals, then he would fire the gay man and the lesbian.[39] Kavanaugh then explains that there are two distinctly different outcomes because discrimination based upon sexual orientation is a distinct type of discrimination separate and apart from discrimination based upon sex.[40]

The majority opinion defends against these two attacks by positing that the dissents' examples focus on *class based* discrimination as opposed to Title VII's focus on *individual* discrimination.[41] Therefore, this counterargument maintains that all these examples do is show that the employer has discriminated twice, rather than once.[42] Thus, under

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32. *Id.*

33. *Id.*

34. *Id.* ("Homosexuality and transgender status are distinct concepts from sex, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.") (internal citations omitted).

35. *Id.* at 790 (Kavanaugh, J., dissenting).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 662 (majority opinion) ("Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women.").

42. *Id.* ("Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.").

the majority's reasoning, Justice Alito's example necessitates that Employee A be looked at on an individual level.[43] And at this individual level we see that his biological sex is a but-for cause of his firing because, again, if he were female, he would not have been fired.[44] And the same would be true for Employee C.[45] Therefore, even under the examples from the dissent, we inevitably come back to discrimination "because of . . . sex."[46] It is largely irrelevant that we can point to a similarly situated male and female who were not fired, because "Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women."[47] In Justice Kavanaugh's hypothetical, for example, sex discrimination occurred both to the two women in the first scenario and to a man and woman in the second scenario. Therefore, sex discrimination occurred in each instance. Again, the Court is utilizing a very literal approach, and essentially asking, "If the sex of the party is changed, is a different outcome obtained?" If the answer is yes, then sex is the but-for causation of the employment action, and Title VII has been violated.[48]

With the majority's emphasis on applying common sense definitions to arrive at its conclusion, it is perhaps somewhat peculiar that the common understanding in society of this type of discrimination would likely go against the majority's interpretation. For example, if a headline informed people that a large employer fired all of its gay employees, people would surely not think, "What a sexist thing to do." Rather, in modern parlance, the employer would be accused of being "homophobic" and "anti-gay."

B. The Majority's Approach as a Literalist Rather than Textualist Interpretation of Title VII

Bostock was a case that received widespread media attention and many Americans have strong opinions on LGBTQ issues. This politically contentious nature of the case means that many Americans were destined to be disappointed regardless of how the Supreme Court ruled. The main thrust of this Article is not to criticize, debate, or advocate for or against the ultimate conclusion reached by the Court. Justice Alito wrote a vigorous and well-reasoned dissent addressing the arguments made by the Court and reaching a different conclusion.[49] The authors find Justice Alito's arguments and interpretation of Title VII to be more

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 683 (Alito, J., dissenting).

persuasive than the majority's, and his dissenting opinion is worth reading. The authors' opinion is that the majority makes a basic category error by conflating "sex" with the separate categories of being transgendered or homosexual. While these categories are related to each other, they are separate and distinct. Both a biological woman and a biological man can also identify as transgender or homosexual, and discriminating based upon the latter two categories is inherently different than discriminating based upon the former. However, regardless of how one feels about the merits of the opinion reached by the majority, this Article is more concerned with analyzing the statutory interpretation framework utilized by the majority to justify its conclusion and the potential issues created by this method. In this regard, this Article posits that Justice Kavanaugh's dissent provides better insight into the majority's reasoning than Justice Alito's.[50]

Notably, the Court does not rely upon a policy argument that society has changed and thus homosexual and transgender people should be protected by Title VII. Nor does it argue that the word "sex" is understood differently in modern times and thus the statute should be read differently now than when originally drafted. Rather, the Court justifies its conclusion by focusing exclusively on the language of the statute and the meaning of its words at the time the statute was drafted.[51] Because it focuses solely on the language of the statute, the Court's opinion in *Bostock* has been referred to by many commentators as "textualist."[52] This Article argues that Justice Kavanaugh's dissent is correct in noting that the majority opinion should not be understood as a textualist triumph.[53] Rather, the Court's approach is best understood as a literalist interpretation of Title VII that relies solely upon the literal meaning of the words of the statute to an extreme that even an ardent textualist like Justice Scalia would not.[54]

In recent Supreme Court history, the statutory interpretation approach commonly referred to as "textualism" or "originalism," is often cited as a legacy of the late Justice Antonin Scalia.[55] While this standard of statutory interpretation is common today, this was not always the

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50. *Id.* at 780 (Kavanaugh, J., dissenting).

51. *Id.* at 654 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

52. *See, e.g.*, Sam Capparelli, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of* Bostock v. Clayton County*?*, 88 U. CHI. L. REV. 1419, 1419 (2021) ("Writing for the majority, Justice Neil Gorsuch adhered to textualist principles and relied on the ordinary public meaning of the phrase 'discriminate because of sex.'").

53. *Bostock,* 590 U.S. at 784 (Kavanaugh J., dissenting) (citing Justice Scalia for the proposition that "the good textualist is not a literalist").

54. *Id.*

55. *See* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017) (discussing how Scalia is credited for bringing textualist statutory interpretation into the judicial mainstream).

case.[56] Prior to Justice Scalia's arrival on the Supreme Court, statutory interpretation was much more policy-based than text-based.[57] While textualism is commonly seen as "conservative" legal doctrine, it is a credit to Justice Scalia's legacy that the majority opinion in *Bostock,* joined in by the four "liberal" justices on the Court, states that it relies upon textualist principles, even though it reaches a conclusion widely derided by political conservatives.[58] As stated by Justice Kagan, Scalia's textualist statutory interpretation has become so widely adopted that "[w]e're all textualists now."[59] It is now widely accepted that the meaning of the words of a statute should drive its interpretation and the outcome of court cases, not a judge's opinion about what the best policy outcome is.[60]

While the *Bostock* opinion may seem textualist on the surface, it departs from textualism in some important respects. Textualism focuses on the "ordinary" meaning of words and phrases in a statute, not their literal meaning.[61] The ordinary meaning of words that textualism seeking requires the interpreter of the statute to try to determine how an ordinary, reasonable person would understand the text of the statute in its context.[62] This "ordinary" meaning of words can, but will not always, vary from a literal meaning. This is an important distinction. As Justice Kavanaugh notes, the Court's basic logic "seizes on the meaning of the statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase 'discriminate because of sex' that is literal."[63] This observation is hard to characterize as inaccurate. As previously discussed, the Court mechanically defines "discriminate," "because of," and "sex," putting those definitions together, and concludes that any discrimination that in any way requires knowledge of the employee's sex violates Title VII.[64] This mechanical

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56. *Id.* at 304 (noting how Justice Kagan admitted that in the 1980s, the approach to statutory interpretation was policy based, and focused on what the statute "should be" rather than the words of the statute).

57. *Id.*

58. *See, e.g.*, Daniel Horowitz, Conservatives Get Massacred by Fake "Conservative" SCOTUS, CONSERVATIVE REV. (June 15, 2020), https://www.conservativereview.com/news/horowitz-conservatives-get-massacred-fake-conservative-scotus/ (criticizing recent Supreme Court rulings, but showing particular disdain for the *Bostock* opinion).

59. *See* O'Scannlian, *supra* note 55, at 304 ("Two years ago, during the Antonin Scalia Lecture series at Harvard, Justice Elena Kagan declared 'we're all textualists now.'").

60. *Id*.

61. *Bostock*, 590 U.S. at 784.

62. *Id*, *see also* Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal their Application of the Absurdity Doctrine*, 19 NEV. L. J. 741, 747 (2019) (noting that "Modern textualists recognize that language is a social construct, drawing on work in philosophy of language originating with Wittgenstein . Hence, some scholars employ the term 'ordinary meaning' to distinguish the inquiry of modern textualists from that of the earlier 'literalist' textualists.") (internal citations omitted).

63. *Bostock,* 590 U.S. at 800.

64. *See supra* Discussion Part II.A.

approach is better understood as a "literalist" approach rather than a traditional textualist approach to statutory interpretation.

Justice Kavanaugh gives some helpful examples of how literal meaning and ordinary meaning can differ.[65] He notes that a statute might prohibit "vehicles in the park."[66] While this prohibition would literally encompass baby strollers, a textualist interpretation of the statute would not require this interpretation because the ordinary meaning of the word "vehicle" would not encompass baby strollers.[67] While a textualist interpretation and a literalist interpretation can often coincide, if a literal interpretation of a word or phrase conflicts with the ordinary meaning of the word or phrase in context, under textualism the literal meaning should be disposed of for the ordinary meaning.[68]

Given the rote, mechanical interpretation the majority employs in *Bostock*, whether one agrees with the conclusion or not, it is difficult to dismiss as invalid Justice Kavanaugh's analysis of the method of interpretation employed. The majority opinion is remarkably stark and mechanistic. It expressly dismisses the employer's appeal to an ordinary person's interpretation "discrimination because of sex" as a "conversational answer" that must give way to the statute's "strict terms."[69] It considers the subsequent failed attempts by Congress to amend Title VII to include sexual orientation to be irrelevant.[70] It never even discusses or addresses other interpretations or uses of the phrase or concept of "sex discrimination" found in other statutes, an interpretation method specifically utilized in Justice Scalia's brand of textualism.[71] The Court even acknowledges that "homosexuality and transgender status are distinct concepts from sex."[72] However, since in a very literal sense an employer cannot fire an employee for being homosexual or transgender without first knowing the employee's sex, the Court simply does not care that Congress considers them to be

65. *Bostock*, 590 U.S. at 785.

66. *Id.*

67. *Id.*

68. *See* Dove, *supra* note 62 at 747.

69. *Bostock*, 590 U.S. at 666.

70. *Id.* at 670 (dismissing appeals to other statutes in interpreting Title VII as "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.").

71. *See West Virginia University Hospitals Inc. v. Casey*, 499 U.S. 83, 88–92 (1991) (in determining whether "attorney's fees" in a statute also includes expert witness fees, Scalia, writing for the majority, refers to the "record of statutory usage" related to attorney's fees and expert witness fees to interpret what the term in the given statute means); *see also Bostock* at 792 (Kavanaugh, J. dissenting) ("That longstanding and widespread congressional practice matters . . . When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork.").

72. *Id.* at 645.

separate concepts and has consistently used different terminology in statutes to describe them.[73]

While on the surface the majority opinion may seem textualist, it eschews important principles of textualism and instead focuses solely on the literal definitions of the words employed. This literalist interpretation has obviously led to a tremendous change in employment discrimination law—discrimination against homosexual and transgender employees is now expressly illegal on a nationwide level.[74] In doing so, the authors argue, particularly with respect to transgender employees, the Court takes a contentious and unresolved societal debate and injects it into a statute that is poorly designed to address it. To frame this argument, this Article will next address the concept of transgenderism, how it is currently defined, and the vigorous public policy debate surrounding how best to accommodate transgender individuals in society. This is an important step in the analysis that is frequently skipped by commentators, and was skipped by the Supreme Court in *Bostock*. By addressing this issue first, it can be more clearly seen that Title VII, at least as currently drafted, is a poor vessel for addressing discrimination against transgender individuals in employment, particularly through shoehorning the concept into the existing definition of sex.

III. DEFINING "TRANSGENDER" AND RELATED PUBLIC POLICY ISSUES

The *Bostock* opinion never clearly defines or discusses the term "transgender." Rather, it simply refers to one of the plaintiffs, Aimee Stephens, as an individual who "presented as a male" when hired, was treated for gender dysphoria, and was fired after informing her employer that she planned to "live and work full-time as a woman."[75] Based upon these facts, she is referred to as being "transgender" throughout the opinion.[76] Because the facts of the case clearly put Ms. Stephens firmly within the definition of being transgender, and a more thorough definition was not necessary to the majority's literalist reasoning, no further definition or discussion of the concept is discussed in the opinion. While this comports with the majority's literalist reasoning in *Bostock*, from a public policy standpoint, understanding what the term "transgender" encompasses from the view of transgender rights advocates and medical literature is important. The concept is quite different from the term "sex" used in Title VII and does not

73. *Id.* at 669 ("But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discriminate based on sex; the first cannot happen without the second.").

74. *Id.* at 683 ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

75. *Id.* at 653–54.

76. *Id.* at 654.

conceptualize the biological nature of sex in the same way as the *Bostock* majority. Understanding this difference is important to addressing how Title VII is a poor vessel for regulating the expressed needs of transgender workers from an employment discrimination standpoint. A review of how the term "transgender" is currently defined shows that rather than relating to sex in the way the *Bostock* majority claims, it stands opposed to and redefines the traditional understanding of sex as the biological differences between males and females.

As most commonly used in both medical literature and by those that advocate for transgender rights, the term "transgender" is an umbrella term used to refer to individuals whose sense of gender identity differs from their "sex assigned at birth."[77] The term "gender identity" refers to one's own internal, psychological perception of their gender.[78] Notably, this differs from "gender expression," which is how one presents their gender to the outside world.[79] Under these definitions, an individual could be born with full biological female sex characteristics, have a gender identity of male, but maintain a gender expression as female. An individual might identify as transgender but express their gender differently at different times (for example, male at work but female in other social settings). Some transgender individuals may choose to undergo gender reassignment surgery or hormone therapy to make their gender expression as close as possible to their gender identity, but others may not. Some transgender individuals may express their gender somewhere in between common social conceptions of male and female, for example, by wearing traditionally male clothing but also wearing makeup and having short hair. Thus, other individuals, including an employer and co-workers, will not always know whether or not an individual identifies as transgender. Because "transgender" is an umbrella term, it includes people with various gender identities, such as those who consider themselves "non-binary," "gender fluid," or "genderqueer."[80]

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77. *See, e.g.*, Jack Turban, *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Aug. 2022), https://web.archive.org/web/20220825175819/https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria; *see also* Guy T'Sjoen, et al., *Endocrinology of Transgender Medicine*, 40 ENDOCRINE REVS. 97, 98 (2019) ("Transgender is used as an umbrella term to describe individuals whose gender identity differs from the assigned sex at birth."); *see also Understanding Transgender People: The Basics*, ADVOCATES FOR TRANS EQUALITY, https://transequality.org/issues/resources/understanding-transgender-people-the-basics (last visited Jan. 20, 2025) ("Transgender is a broad term that can be used to describe people whose gender identity is different from the gender they were thought to be when they were born.").

78. *See* Turban, *supra* note 77.

79. *Id.* ("It is important to note that gender identity is different from gender expression. Whereas gender identity refers to one's psychological sense of their gender, gender expression refers to the way in which one presents to the world in a gendered way.").

80. *See Understanding Transgender People: The Basics*, *supra* note 77; *see also* Sabra L. Katz-Wise, *Gender fluidity: What it means and why support matters* (Dec. 3, 2020), HARVARD HEALTH PUBL'G, HARVARD MED. SCH., https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544 ("Gender fluidity refers to change over time in a person's gender expression or gender identity, or both. . . As an identity, it typically fits under the

"Gender dysphoria" is an accompanying, but different concept.[81] Under current diagnostic guidelines for psychiatrists, gender dysphoria refers to psychological distress that accompanies the individual's feelings of gender identity that is incongruent with their sex.[82] Under current psychiatric standards, an individual must display "clinically significant distress or impairment in social, occupational, or other important areas of functioning" in order to be diagnosed with gender dysphoria.[83] An individual may thus meet the definition of transgender, but not be diagnosed with gender dysphoria due to a lack of diagnosed psychological distress.

While not every transgender individual suffers from gender dysphoria, rates of mental health diagnoses among transgender individuals are high.[84] This is both troubling and noteworthy with respect to suicide rates.[85] Some studies have found rates of suicidal ideation among transgender individuals as high as 50%–75%.[86] Suicide rates are particularly high among transgender youth, and as a whole rates of suicide and other mental health problems are substantially higher for transgender individuals than for the general population.[87] There has been intense societal debate surrounding gender affirming care—including gender transition surgical interventions—and how it relates to mental health for transgender individuals, with some states banning such care for minors.[88] Researchers continue to explore the link between gender-affirming treatments and suicidality, and the results have been conflicting.[89]

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transgender and nonbinary umbrella, which applies to people whose gender identity doesn't match the sex assigned to them on their original birth certificate.").

81. Turban, *supra* note 77.

82. *Id.*

83. *Id.*

84. T'Sjoen, et. al., *supra* note 77, at 100 (noting high rates of mental health diagnoses in the transgender population).

85. *See* Daniel Jackson, *Suicide-Related Outcomes Following Gender-Affirming Treatment: A Review*, CUREUS, Mar. 2023, at 1, 1.

86. *Id.*

87. *Id*. ("There is accumulating literature that suggests transgender individuals suffer worse mental health outcomes than their cisgender peers; of particular concern is increased suicidality."); *see also* Ines Rafael Marques, et al., *The Impact of Gender-Affirming Surgeries on Suicide-Related Outcomes: A Systematic Review*, 5 J. PSYCHOSOCIAL HEALTH 134, 135 (2023) ("[I]t should be noted that mental health outcomes, particularly those related to suicide, are not exclusive to patients with a GD (gender dysphoria) diagnosis. Trans people overall are at a greater risk for suicide, and there have been reports of a higher prevalence of suicidal thoughts and attempts among this population.") (internal citations omitted).

88. *See Supreme Court Adjourns Oral Arguments in Historic Transgender Rights Hearing*, AM. CIVIL LIBERTIES UNION OF TENN. (Dec. 4, 2024), https://www.aclu-tn.org/en/press-releases/supreme-court-adjourns-oral-arguments-historic-transgender-rights-hearing (discussing a lawsuit pending before the United States Supreme Court challenging the state of Tennessee's ban on gender affirming care for minors under the Equal Protection Clause).

89. *See* Jackson, *supra* note 85, at 11 (conducting a meta-analysis of 23 different studies, and finding inconsistent results and methodological problems leading to a conclusion that "There is a need for continued research on suicidality outcomes following gender-affirming treatment. Future

This definitional clarity of the modern understanding of what is meant by "transgender" is important to understanding the problems created by the Supreme Court's opinion in *Bostock*. As previously noted, by focusing simply on the fact that being transgender is related to the idea of sex, *Bostock* makes a category error of putting the two concepts into the same category for purposes of protected class identification.[90] In fact, the modern conception of "transgender" reflects a completely different understanding of the term "sex" from that used in Title VII, or even by the majority in *Bostock*. This is evident by how the modern transgender rights advocates, and most medical practitioners, reject the use of the term "biological sex" and instead use "sex assigned at birth."[91] Indeed, the use of these terms was discussed in oral arguments in the *Bostock* case, with the Supreme Court in the majority opinion ultimately opting not to use the term "sex assigned at birth," but instead assuming "sex" as used in Title VII refers "only to biological distinctions between male and female."[92] The Supreme Court is, of course, free to define terms in a different way than that of modern medical literature or transgender advocacy groups. But this difference in terminology does not reflect a mere difference in preferred language. Rather, it reflects a very real philosophical difference about the nature of what sex is. This is not without consequence.

The term "sex assigned at birth" is used to challenge the idea that sex is inherently biological or binary.[93] The term does not deny a biological aspect of sex.[94] Rather, advocates for this term insist that while biology plays a role, it does not create a strict binary between male and female, because sex is not static—social institutions play a role in the conception of sex as well.[95] A full discussion of the debate between

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research that incorporates multiple measures of suicidality and adequately controls for the presence of psychiatric comorbidity, substance use, and other suicide risk-enhancing factors is needed to strengthen the validity and increase the robustness of the results."); *see also* Marques, et al., *supra* note 87, at 136, 142 (conducting a meta-analysis of 13 studies, and finding the most common finding of a decrease in suicidal ideation after gender affirming care, but less consistent results with respect to suicide attempts); *but see* John J. Straub, et al., *Risk of Suicide and Self-Harm Following Gender-Affirmation Surgery*, 16 CUREUS, 1, 1-2 (2024) (conducting a retrospective study with a sample of 1,501 individuals who had gender affirming surgery and an emergency visit, and finding that "Individuals who underwent gender-affirming surgery had a 12.12-fold higher suicide attempt risk than those who did not.")

90. *See supra* Discussion Part II.B.

91. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1823 (2022) (discussing the development of the term "sex assigned at birth" and noting that "Over the past two decades, the concept of sex assigned at birth has been taken up by transgender rights advocates to replace the troublesome term 'biological sex.'").

92. *Id*. at 1824.

93. *Id*. at 1853–54 (discussing how the term "sex assigned at birth" challenges a "unified concept of 'biological sex'" and that the "process of assigning sexes to infants is a social one.").

94. *Id*. at 1853 ("the biology of sex is complex, multi-faceted, and dynamic.").

95. *Id*. at 1854 ("the biology of sex is not simply about genitalia at birth—it involves chromosomes, hormones, gonads, and changes at puberty—some of which may not be 'strictly binary' or in accordance" and that "the genetic and hormonal aspects of sex are not fixed and innate; they are influenced by environment and experience over time.").

those who argue for sexual dimorphism and a more fluid approach to sex is outside the scope of this article, and has been well and fully articulated elsewhere.[96] Rather, the point of noting this difference is that modern understandings of what sex is within the movement for transgender rights does not comport with the how the majority in *Bostock* acknowledges the term "sex" was understood at the time Title VII was drafted.

The modern conception of what it means to be transgendered does not merely mean a person born in a biologically male body but who identifies their gender as female, or vice versa. Rather, it is a constellation of different ideas regarding the very nature of sex and gender. It is inextricably interrelated with important public policy issues regarding mental health and medical care, particularly with respect to minors. Accordingly, being transgendered carries with it unique concerns that are different than those sought to be addressed by sex discrimination when Title VII was drafted. Next, this article will discuss how this complex nature of what it means to be transgendered makes shoehorning it into the definition of "sex" under Title VII ill advised, even for those who advocate for greater employment rights for transgender individuals.

IV. CONFLATING SEX AND TRANSGENDER DISCRIMINATION UNDER TITLE VII AND HOW TO MOVE FORWARD

As discussed previously, this article argues that the literal, simplistic reasoning of *Bostock* makes a category error by conflating the categories of "transgender" and "sex," as "sex" is used in Title VII.[97] Next, this article will discuss why this is not merely a semantic problem, or even merely a statutory construction problem. Rather, due to conflating these two separate categories, the expressed workplace needs of those who are transgendered are not likely to be met. Because Title VII was not designed with the needs of transgendered individuals in mind, merely including them under the definition of "sex" does not meet these expressed needs, nor does it provide clear guidance to employers. While other commentators have made this point,[98] this article advances the literature in this area by more precisely evaluating the core of this mismatch so that potential solutions can be better understood. To accomplish this, we first discuss the nature of the protected classes in Title VII, and where being transgendered fits within this framework.

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96. *Id*. at 1832–1850 (tracing the history of the terms "biological sex" and "sex assigned at birth" and the debate related thereto).

97. *See supra* Discussion Part II.

98. *See, e.g.*, Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L.J. 39, 341 (2022) (arguing for amendments to Title VII to clarify issues related to transgendered discrimination).

A. The Nature of Title VII's Protected Classes

Title VII generally prevents discrimination in employment against individuals based upon their race, national origin, color, sex, or religion.[99] Given the history of discrimination in the United States, it is not difficult to see why these five classes were chosen at the time of Title VII's drafting. All of these classes had experienced societal discrimination in some way, and specifically with respect to employment. The basic goal of Title VII was to create, as much as possible, a meritocracy in employment where the best, most qualified person was hired for the job, as opposed to being hired based upon some other characteristic.

One common misconception is that these protected classes were chosen because they represent immutable characteristics which have no bearing on one's ability to perform a job, and upon which a person should not be judged. While this might be true for some of the protected classes, for example race, it is not true for all of them. One's religion is clearly not an immutable characteristic, and depending upon the job, may have a bearing on how well one may perform it. A devout Muslim would make a very poor Catholic priest, and many devout Muslims would not be willing to work in a slaughterhouse that slaughters pigs. A fairer reading of Title VII is that the protected classes represent categories of individuals who have historically been discriminated against, which a majority of society believes should not be discriminated against, and who it was politically feasible to include within Title VII. There are certainly other categories of attributes that many individuals ethically believe should not be considered in employment decisions that could have been included—for example political beliefs or physical appearance—and were not.[100]

Title VII acknowledges that there are differences between these protected classes, and in combination with other statutes, seeks to accommodate these differences. For example, while societal views on sex and gender are currently in a state of flux,[101] at the time of the drafting of Title VII, as noted by the majority in *Bostock,* "sex" was mostly thought of as the biological characteristic of being either male or female.[102] However, both the text of Title VII and court cases interpreting it acknowledge that there are very real differences between the sexes that can impact performance for certain jobs and thus

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99. 42 U.S.C. § 2000e-2(b).

100. *See, e.g.*, Michael Conklin, *Unlocking the Beauty from Within Title VII: Arguing for An Expansive Interpretation of Title VII to Protect Against Attractiveness Discrimination*, 31 AM. U. J. GENDER, SOC. POL'Y & L. 25 (2023).

101. *See supra* Discussion Part III.

102. *Bostock v. Clayton Cty.*, 590 U.S. 644, 655 (2020).

employers should be able to take sex into account in some situations.[103] This is why, for disparate treatment cases involving sex discrimination, Title VII recognizes the "bona-fide occupational qualification" (BFOQ) defense.[104] Due to recognized differences between the sexes, there may be instances where the nature of the job necessitates specifically hiring a male or female.[105] For example, a hospital was held to be justified in requiring a female, as opposed to a male, nurse to work nights to care for juvenile patients who had previously been sexually abused.[106] However, the text of Title VII recognizes that the BFOQ defense cannot be used in cases involving race or color discrimination, as the same recognized differences between the sexes do not exist between different races and ethnicities.[107]

Later amendments to Title VII, as well as other statutes, recognized additional protections that may be needed for female workers due to inherent biological differences. The Pregnancy Discrimination Act amended Title VII to expressly make discrimination based on pregnancy a part of sex discrimination.[108] Additionally, the Pregnant Workers Fairness Act required employers to provide a reasonable accommodation to enable pregnant workers to continue to do their job.[109] These additional statutes show that the law has recognized the unique nature of the differences between the sexes and acted to accommodate them within the framework of employment discrimination law.

The same can be said for religion, the most unique of the Title VII protected classes. The term "religion" has been notoriously difficult to define. The most common definition used by courts in Title VII cases is that proffered by the Supreme Court in a case involving the Military Selective Services Act–"a sincere and meaningful belief that occupies a place in the life of its possessor parallel to that filled by . . . God."[110] This

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103. *See* 42 U.S.C. § 2000e-2(e)(1) (noting the bona fide occupational qualification allowing for employment decisions based upon sex when "reasonably necessary to the normal operation of that business or enterprise").

104. *Id.*

105. *Id.*

106. *See Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996) (holding that due to the therapeutic needs of the patients, the hospital was justified in considering sex when addressing staffing concerns).

107. 42 U.S.C. § 2000e-2(e)(1) (only allowing the BFOQ exception for religion, sex, and national origin; notably, most scholars and lawyers acknowledge that such an exemption must exist under the First Amendment for artistic jobs, like acting, when the race of the character is important to the artwork); *See* Nicole Ligon, *Who Tells Your Story: The Legality of and Shift in Racial Preferences within Casting Practices*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 135, 138-39 (2019) (discussing the history of allowing for an exemption to race discrimination in casting calls for actors, as long as race is integral to the artistic merit of the story).

108. *See* 42 U.S.C. § 2000e(k) (expressly stating that "because of sex" includes discrimination because of pregnancy and related issues).

109. 42 U.S.C. § 2000gg-1.

110. United States v. Seeger, 380 U.S. 163, 166, 176 (1965).

is a vague definition, and some lower courts have sought to develop multi-step tests to make it more precise.[111] Because one's religion reflects an internal, subjective belief that may not always be outwardly manifested in any way, it is possible to lie about one's religion or for one's religion to not be known by an employer. Thus, both courts and the EEOC have consistently acknowledged that a religious belief must be "sincerely held."[112] While it has rarely happened in reported cases, this does hold open the possibility of an employer questioning whether an employee truly believes the religion they are claiming.[113]

Another unique aspect of religion is that it commonly carries with it practices for its adherents. This was no surprise to the drafters of Title VII, and Title VII accounts for it. Unlike the other protected classes, Title VII requires employers to provide a reasonable accommodation for the religious practices of employees.[114] This means that employers must make accommodations for religious employees in the workplace unless doing so would create an "undue hardship."[115] This standard recognizes that not all religious practices can be tolerated within a functioning work environment, and allowances must be made. For example, a male employee might have a sincerely held religious belief that he cannot work in the same workplace with women, but because accommodating this would require the employer to violate Title VII, such an accommodation would not be reasonable. Just like with sex, Title VII recognizes the unique nature of this protected class and provides an accommodation for it within the statute.

This brief overview of Title VII's protected class structure illustrates a very commonsense point—crafting sensible employment discrimination law is not a "one size fits all" endeavor. Once protected classes are made within an employment discrimination statute, allowances for different employer behaviors may need to be made due to the unique nature of those protected classes and what society is willing to accept within the work environment. Employment discrimination law represents a delicate balancing act of the needs of individuals within specific groups (often who feel marginalized) and the needs of society as a whole to have a functioning workplace environment. The structure of employment discrimination statutes illustrates this.

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111. *See* Fallon v. Mercy Med. Center, 877 F.3d 487 (2017) (developing a three-step test for determining what beliefs qualify as religious under Title VII).

112. *See Compliance Manual on Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (last visited September 4, 2025) (noting that "Title VII requires employers to accommodate those religious beliefs that are 'sincerely held.'").

113. *Id.*; *see* Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Amer., 164 F. Supp. 2d 1066, 1076 (2001) (holding that a union did not violate Title VII by making an inquiry into the sincerity of a member's beliefs before accommodating him).

114. *See* 42 U.S.C. § 2000e(j).

115. *See* Groff v. DeJoy, 600 U.S. 447, 453-54 (2023).

This discussion is limited to Title VII, but this picture becomes even clearer when other employment discrimination statutes are considered. Because the needs of disabled individuals are unique, a separate statute regulates disability discrimination, rather than simply adding "disability" as another class to Title VII.[116] Because disabled individuals have unique workplace needs, this statute, like with religious discrimination, requires employers to provide a reasonable accommodation for disabled employees provided they can fulfill the essential job functions with the accommodation.[117] Notably, the statute only requires a "reasonable" accommodation, so there is a limit to how far employers have to go. Again, the statute recognizes the balancing of interests between the employer and the employee.

This overview illustrates why taking one category of individuals with unique needs (transgender individuals) and forcing it into a statutory framework designed to address a different set of needs (sex, conceptualized as male versus female) is bound to create problems. The current structure of Title VII's sex discrimination statute is simply not designed to address the unique challenges and needs voiced by transgendered individuals. This article argues that to craft a reasonable solution to this problem within the existing framework of employment discrimination law, two issues need to be addressed: (1) what are the unique expressed needs of transgendered individuals in the workplace, aside from simply not being discriminated against, and (2) based upon these needs as well as the nature of the protected classes, which of the existing protected classes are transgendered individuals most similar to? This article argues that by analyzing these two points, one can see why placing transgender discrimination under the umbrella of sex discrimination is misguided, as the needs and the nature of the protected classes are different. This article will next discuss these two points in turn.

B. Expressed Workplace Needs of Transgender Advocates

There are numerous non-profit organizations, academics, and others who have advocated for the rights and needs of transgender individuals in the workplace. A review of the most commonly expressed needs reveals that they have only a passing resemblance to, or sometimes are directly in conflict with, those addressed by the protected class of "sex" in Title VII.

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116. *See* 42 U.S.C. § 12101, et. seq.

117. *See* 42 U.S.C. § 12111(9) (defining "reasonable accommodation" with respect to disability discrimination).

1. Bathroom and Locker-Room Use

A common need voiced by transgender individuals is the right to use bathrooms, locker rooms, and other private spaces that correspond to their gender identity.[118] The EEOC has taken the position that this is required by Title VII.[119] This issue is not expressly addressed by Title VII, and the Supreme Court expressly declined to address it in *Bostock*.[120] When policing discrimination related to the protected class of sex, Title VII clearly emphasizes protecting the rights of women in the workplace, as they have historically been discriminated against, including being sexually harassed and pressured to give sexual favors at work.[121] Thus, the protection of women, particularly from sexual predation at the workplace, is a clear concern of Title VII. This article argues that women's rights to safe private spaces in the workplace is a legitimate public policy concern that necessitates open societal dialogue, as there are important privacy and safety concerns raised.

In many workplace environments, this may not be a pressing issue. For example, a standard office environment may be able to make do with single person bathrooms. In other workplaces—for example factory settings where there are locker rooms and shower facilities where workers are disrobed and changing clothes—this could be a contentious privacy issue. Also, given that gender identity and gender expression can diverge, it could be particularly difficult for cisgender female employees to cope with a transgender employee whose gender identity is female, but whose gender expression is still largely male, being present in intimate spaces like showers and locker rooms.

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118. *See* Christian N. Thoroughgood, Katina Sawyer & Jennica R. Webster, *Creating A Trans-Inclusive Workplace*, HARV. BUS. REV. (April 2020), https://hbr.org/2020/03/creating-a-trans-inclusive-workplace.

119. *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, EQUAL EMP. OPPORTUNITY COMM'N (last visited Jan. 20, 2025), https://web.archive.org/web/20250107014604/https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination#expand ("The Commission has taken the position that employers may not deny any employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.").

120. Bostock v. Clayton Cty., 590 U.S. 644, 681 (2020).

121. *See EEOC Data Highlight*, EQUAL EMP. OPPORTUNITY COMM'N (April 2022), https://www.eeoc.gov/sites/default/files/2022-04/Sexual%20Harassment%20Awareness%20Month%202022%20Data%20Highlight.pdf (noting that of the 27,291 charges alleging sexual harassment received between 2018 and 2021, 78.2% were filed by women). (Notably, the EEOC has numerous reports related to the needs of women in the American workforce, but the authors could find no reports discussing the specific needs of men in the workforce. This highlights the emphasis of protecting women when it relates to sex discrimination, as they are more commonly the victims of sex discrimination than men.).

2. Healthcare Needs of Transgendered Employees

The healthcare needs of transgendered employees may be substantially different than those of other employees.[122] Transgendered employees may incur medical expenses for gender reassignment surgery, which are not always covered by employer health benefits.[123] And as previously noted, transgendered individuals have a higher incidence of mental health diagnoses,[124] and thus have medical expenses and need for time off work related thereto.[125] Title VII addresses specific differences in healthcare needs that women have related to pregnancy.[126] But because it was not designed to do so, it does not address these specific healthcare needs of transgendered employees.

3. Pronoun Usage

Transgender rights advocates express concern that it is important for transgender employees to be referred to by their preferred pronouns.[127] This may include the standard gendered pronouns (he, him, she, her) that correspond to their gender identity, but may also include alternative pronouns (they, theirs, ze, zir, zem).[128] When an employer or co-workers intentionally use pronouns that do not correspond with an individual's gender identity simply to harass them, such behavior would appear to squarely fit within Title VII's current framework for hostile environment harassment, as noted by the EEOC.[129] However, what is not clear is whether or not an employee who is religious must use a transgendered employee's preferred pronouns when they have a sincere religious objection to doing so. In other contexts, courts have recognized a First Amendment right to refuse to use preferred pronouns of transgendered individuals.[130] Again, this is an issue that is simply not clearly addressed in Title VII or its related jurisprudence, as it was not designed to regulate the rights of transgender individuals in employment.

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122. *See* Thoroughgood, Sawyer, & Webster, *supra* note 118.

123. *Id*.

124. *See supra* Discussion Part III.

125. *See* Thoroughgood, Sawyer, & Webster, *supra* note 118.

126. *See* 42 U.S.C. § 2000e(k) (expressly stating that the term "because of sex" includes discrimination because of pregnancy and related issues).

127. *See* Thoroughgood, Sawyer, & Webster, *supra* note 118.

128. *Id*.

129. *See* Sexual Orientation and Gender Identity (SOGI) Discrimination, *supra* note 119 (noting that "intentionally and repeatedly" using incorrect pronouns can "contribute to an unlawful hostile work environment").

130. *See Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (reversing trial court's dismissal of a college professor's First Amendment claim related to his refusal to use a student's preferred pronouns in the classroom).

4. Dress Codes

Under Title VII, courts have long held that it is generally not discriminatory for employers to have dress codes with different appearance standards for male and female employees.[131] This recognizes the reality that both due to differences in physiology as well as societal norms for professional dress, men and women's apparel is different.[132] Advocates for transgender rights express the need for transgender employees to be able to dress in accordance with their gender identity.[133] The EEOC interprets Title VII as requiring this.[134] While this could be easily accommodated in some work environments–for example, a factory where workplace dress may be largely unisex–it may be much more difficult for employers to accommodate in other workplaces.

This list is not exhaustive, but these commonly expressed needs illustrate that the needs of transgender employees under Title VII are not the same as those of cisgender male and female employees. While all of these needs can potentially be accommodated by Title VII through an expansive judicial interpretation, the fit is not a natural one, and Title VII risks being contorted in awkward ways through court decisions. Because the appropriate scope of transgender rights in our society continues to be a hotly debated political issue, such a course also threatens to throw employers and employees unnecessarily into an issue better suited for resolution through the political branches of government.

C. Comparing Being Transgendered to Other Protected Classes

As previously discussed, the *Bostock* majority found that Title VII applied to transgendered individuals through the protected class of "sex."[135] While the modern conception of being transgendered is related to sex, it represents much more than just sex. And the Supreme Court in *Bostock* used a different conception of "sex" than envisioned by the drafters of Title VII.[136] When the modern conception of being transgendered is compared to the other protected classes in both Title VII and other employment discrimination laws, it bears greater similarity to the protected classes of religion and disability.

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131. *See* Justin Blount, *Sex-Differentiated Appearance Standards Post-Bostock*, 31 GEO. MASON U. CIV. RTS. L.J. 217, 228-35 (2021) (discussing how case law under Title VII has allowed sex-differentiated dress codes).

132. *Id*.

133. *See* Thoroughgood, Sawyer, & Webster, *supra* note 118.

134. *See* Sexual Orientation and Gender Identity (SOGI) Discrimination, *supra* note 119 ("Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.").

135. *See supra* Discussion Part II.

136. *See supra* Discussion Part III.

First, being transgendered is predicated on an individual's subjective, internal feeling that their gender identity is different than that of their "sex assigned at birth."[137] This gender identity does not necessitate any outward manifestations, as gender identity (internal psychological feelings) and gender expression (presentation of gender to the outside world) are expressly referenced as different concepts.[138] Thus, the only person who can fully determine if someone is transgendered is that person, as it is entirely based upon their own internal feeling. Likewise, unless the transgender person chooses to either tell others or change their gender expression to make it evident, then others will not know if an individual is transgendered.

This characteristic does not make being transgendered ineligible as a protected class it simply makes it different from the protected classes of sex, race, color, and in most circumstances national origin. The majority in *Bostock* proceeded on the assumption that "sex," as envisioned by Title VII, refers "only to biological distinctions between male and female."[139] These biological distinctions, in the vast majority of situations, are readily apparent when meeting someone, and due to various social norms surrounding sex can be observed. The same is generally true for race, color, and national origin. Whether through pernicious stereotypes (which is the basis of much historical discrimination) or otherwise, these protected classes are usually readily ascertainable, which in most situations is what leads to discrimination. As envisioned by Title VII, an individual's sex, race, color, and national origin are not based on subjective internal feelings, but objective characteristics—or at least the discriminator's perception of the existence of those objective characteristics.[140]

In this way, the protected class of being transgendered is more similar to religion and, to a lesser extent, disability. Unlike the other Title VII protected classes, religion *is* entirely predicated on one's internal, subjective beliefs. Only the individual can truly determine their religion. Likewise, a religious person may choose to outwardly manifest that religion through words, actions, or dress, or they may choose to keep that religion private. As acknowledged by transgender advocates and medical professionals, gender identity is fluid and can change throughout time, just like religious beliefs.[141]

Similarly, while some disabilities are readily apparent, such as being in a wheelchair, others are not. An employee might have a mental

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137. *Id.*

138. *Id.*

139. *Bostock*, 590 U.S. at 655.

140. *See, e.g. EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393, 401 (5th Cir. 2007) (holding that an Indian employee harassed as an "Arab," could bring a national origin discrimination claim because the harassment was based upon outward characteristics like accent, appearance, and physical characteristics, that the employer associated with a national origin, albeit a wrong one).

141. *See supra* Discussion Part III.

illness that qualifies as a disability that the employer is not aware of. Additionally, disabilities can be permanent or temporary, and thus disability status can be fluid.

Second, being transgendered carries with it certain characteristics that advocates state require positive obligations of different treatment that are outside normal societal conventions. Advocates for transgender rights express the need to require others to change the traditional and common conventions for the use of pronouns, including the use of new alternative pronouns.[142] They also express the need for modifications to the normal workplace rules for the use of bathrooms and locker rooms.[143] And they express the need for modifications to dress codes.[144] This is fundamentally different from how Title VII treats discrimination with respect to race, color, national origin, and, for the most part, sex. Title VII imposes almost exclusively *negative* obligations *against* discrimination (do not treat people of these classes differently than anyone else with respect to employment) as opposed to *positive* obligations requiring the modification of workplace facilities and practices to accommodate them.[145]

In this way, the protected class of transgenderism is more like the protected classes of religion and disability. Due to the unique nature of these protected classes, Congress determined that simply preventing discrimination against them was not sufficient, but rather, employers needed to expend reasonable efforts to accommodate their unique needs. Because religion carries with it certain practices, employers are required to reasonably accommodate those practices.[146]

Rather than treating religious employees the same as other employees (for example, making them follow the dress code), Title VII sets them apart and creates a positive obligation of special treatment (for example, modification of the dress code to allow them to wear a religious garment that is not allowed for other employees).[147] Likewise, the Americans with Disabilities Act requires employers to reasonably modify workplace practices and policies to accommodate employees with disabilities.[148]

This article argues that such a comparison illustrates that both the nature of the modern conception of what it means to be transgendered, as well as the expressed needs of transgendered individuals, map most

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142. *See* Thoroughgood, Sawyer & Webster, *supra* note 118.

143. *Id*.

144. *Id*.

145. The limited exception here being the requirement to reasonably accommodate pregnancy, which is a subset of the class of sex. *See* 42 U.S.C. § 2000gg-1.

146. *See* U.S. Equal Emp. Opportunity Comm'n, *Compliance Manual on Religious Discrimination*, (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (discussing the reasonable accommodation of religion requirements of Title VII).

147. *Id*.

148. *See* 42 U.S.C. § 12111(9) (defining "reasonable accommodation" with respect to disability discrimination).

closely to the protected classes of religion and disability. Just like both of those classes necessitate unique treatment in employment discrimination law, if being transgendered is to be made a protected class and to meet these expressed needs of the transgendered individuals, a new protected class needs to be made rather than lumping it in with "sex." Next, this article will discuss a potential legislative solution that fits within existing employment discrimination law.

D. Crafting a Reasonable Legislative Solution

If indeed there is a societal need to better accommodate transgender individuals in the workplace, based upon the foregoing analysis we argue that the most reasonable legislative approach for doing so is to create a new protected class under Title VII.[149] Consequently, this protected class could have a reasonable accommodation standard attached to it to accommodate the unique needs expressed by advocates for transgender rights in the workplace.

The definition of this protected class could follow that of the American Psychiatric Association—"an individual whose sex assigned at birth does not align with their gender identity."[150] Likewise, "gender identity" could follow the American Psychiatric Association definition of "a person's inner sense of being a girl/woman, boy/man, some combination of both, or something else, including having no gender at all."[151] This avoids conflating "transgender" with "sex," which creates the problems addressed previously.

The key to our proposal, and what differentiates it from previous proposals,[152] is that with its own protected class, "transgender" would then have its own reasonable accommodation provision, similar to that for religion. Employers would be required to provide reasonable accommodations to transgender employees, provided doing so would not cause an undue burden.[153] The same "undue hardship" standard from *Groff v. DeJoy* could apply.[154] This provides employers with

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149. The authors proffer no opinion on the public policy question of whether it is socially desirable or necessary to expand the rights of transgendered individuals in the workplace. We simply make the point that the far better approach to doing so, both for the transgendered individuals and employers, is through tailored legislation rather than court interpretations of Title VII.

150. *See* Jack Turban, *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

151. *Id*.

152. *See* Reed, *supra* note 98, at 386 (proposing amendments to Title VII addressing various concerns related to LGBTQ discrimination).

153. *See* U.S. Equal Emp. Opportunity Comm'n, *Compliance Manual on Religious Discrimination*, (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (discussing the reasonable accommodation of religion requirements of Title VII).

154. *See* Groff v. DeJoy, 600 U.S. 447, 468 (2023) (holding that "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business").

reasonable guidance on how to navigate most of the concerns noted previously. Does a dress code have to be modified to take into account a transgender individual's gender identity, just like with a religious employee? Yes, unless it poses an undue hardship on the employer. Do medical needs, such as time off for mental health care, have to be accommodated? Again, yes, unless it poses an undue hardship on the employer. Bathroom and locker room use may be slightly more challenging, because navigating this issue involves the rights of other employees. This would involve potentially crafting a privacy exemption of some kind for cisgendered people. While this could be controversial, such controversy is better addressed in political debates rather than in the courts.

It may be desirable to address additional issues other commentators have raised, such as the application of the BFOQ defense to transgender individuals or the rights of religious employees with respect to pronoun use.[155] These could all be addressed through debate in the legislative process. This article's overarching point is two-fold. First, the nature and needs of transgendered individuals, as defined in modern literature from their advocates, are sufficiently different from those of other protected classes to necessitate a new protected class with unique treatment. Second, determining whether or not this is necessary, and what societal trade-offs are involved, is a matter for the legislative process, not for the courts. The reasoning of *Bostock* that simply inserts transgender discrimination into sex discrimination circumvents this process, resulting in a sub-optimal outcome.

V. CONCLUSION

Employment discrimination law inherently involves the delicate balancing of competing interests. For example, the need to provide robust protections against discrimination are balanced against the needs of businesses. In balancing those needs, legislators have to consider numerous factors such as the economic cost of policing employment discrimination, the size of the protected class, the prevalence of discrimination against it, and the likelihood that the discrimination will end on its own due to changes in societal norms. The Supreme Court in *Bostock* circumvented this legislative process through its literalist reading of the term "because of . . . sex."[156] As this article explains, by more thoroughly defining the modern conception of what it means to be transgender, a stronger argument can be made that the term is not intrinsically related to the class of sex as set out in Title VII.[157]

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155. *See* Reed, *supra* note 98, at 386 (proposing amendments to Title VII addressing various concerns related to LGBTQ discrimination).

156. *See supra* Discussion Part II.

157. *See supra* Discussion Part III.

By simply inserting transgender discrimination into Title VII as a part of sex discrimination, transgendered individuals are left without an employment discrimination statute tailored to their needs, employers are left without clear direction, and society is deprived of the opportunity to determine how to regulate employment discrimination against transgender individuals. A more rational way forward is not to allow courts to define the contours of transgender discrimination through interpretations of Title VII. Nor is it rational to amend Title VII to explicitly include gender identity under the protected class of "sex."[158] The more pragmatic solution is to engage in the legislative process and determine how to treat being transgendered as its own protected class. This article provides a valuable framework for how to approach this task.

158. *See* Reed, *supra* note 98, at 386.