TROJAN ZEBRA: UNMASKING *BOSTOCK*'S POTENTIAL TO UNDERMINE LGBTQ+ PROTECTIONS

by
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Engaging with the methodological framework endorsed by the Supreme Court's holding and rejected by the dissents in Bostock v. Clayton County, *this Comment critically examines both the limited scope and potential misuses of the Court's decision recognizing protection against employment discrimination for gay, lesbian, and transgender individuals under Title VII of the Civil Rights Act.*

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I. INTRODUCTION

The Supreme Court's decision in *Bostock v. Clayton County*, recognizing Title VII protection for sexual orientation and gender identity, is a landmark moment long past due. And while the opinion authored by Justice Gorsuch may have printed him in the history books, the role played by employees' counsel—flawlessly executing a brilliant strategy in the face of a staunchly textualist conservative jurist—should not be overlooked. Equipped with an argument that struck a resounding chord on the textual iron of the Civil Rights Act, these attorneys compelled a

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Justice who was bred and buttered by the Federalist Society[1] to declare that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions," because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[2]

In stark contrast, the dissenting opinions in *Bostock* reveal persistent misconceptions within contemporary legal discourse about how sexual orientation and gender identity are related to what they refer to as "biological sex."[3] Moreover, by arguing past the point of judicial temperance and exposing the malignant bias required to sustain their positions, they undermine the credibility of their objections. Had Justices Alito and Kavanaugh merely expressed why they disagreed with the Court's decision, rather than also try to explain why the Court was wrong, their opinions might have been more effective critiques of judicial overreach.

Despite this victory for the LGBTQ+ community, the Court's decision in *Bostock* could also incur unintended consequences. Not only does the Court explicitly leave a backdoor to permissible discrimination on religious grounds unlocked, but expanding the scope of Title VII's protection to include sexual orientation and gender identity may have also paved the way to legal cover for naked bigotry against LGBTQ+ individuals under the guise of heterosexual discrimination.[4] This Comment critically examines the legal argument supporting the Court's decision, the flawed exercise of logic and linguistics that undermine the dissenting opinions' position, and one potential side-effect of this historic moment in the evolution of American civil rights law.

A. Facts

Justice Gorsuch devotes fewer than two pages to the facts of *Bostock*, largely because the legal question before the Court is reasonably straightforward and the necessary facts are relatively sparse: Employees were fired from long-held jobs shortly after their employers learned about their sexual orientation or gender identity.[5] Gerald Bostock's participation in a gay softball league was considered "unbecoming conduct" for an award-winning child welfare advocate.[6] Donald Zarda was fired

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[1] Josh Gerstein, *Gorsuch Takes Victory Lap at Federalist Dinner*, POLITICO (Nov. 16, 2017, 11:45 PM), https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538; David G. Savage, *Leonard Leo of the Federalist Society is the Man to See If You Aspire to the Supreme Court*, L.A. TIMES: POLITICS (July 6, 2018, 3:00 AM), https://www.latimes.com/politics/la-na-pol-leo-court-search-20180706-story.html.

[2] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020).

[3] *See generally id.* at 1754–84 (Alito, J., dissenting) (referencing "biological sex" throughout).

[4] *Id.* at 1753–54 (majority opinion) (speculating about the possibility of religious freedom superseding Title VII protections).

[5] *Id.* at 1737–38.

[6] *Id.*

from the skydiving company where he worked just days after coming out that he was gay.[7] And Aimee Stevens was let go after announcing that she would come to work presenting as a woman upon returning from her vacation.[8] The employers did not contest that the reason for these terminations was the employees' sexual orientation or gender identity but hoped to establish the validity of their position by defending their discriminatory conduct.[9]

B. Background

Prior to the *Bostock* decision, the only consistently accepted Title VII relief related to sexual orientation and gender identity was for claims of sexual harassment (either the quid pro quo or hostile work environment variety) and discrimination on the basis of gender stereotypes.[10] As this issue has grown to greater prominence over the past several years, the majority of circuits have rejected blanket protections for LGBTQ+ individuals under Title VII, while a few have construed the statute's language to include discrimination on the basis of sexual orientation and gender identity.[11]

These circuits' adoption of an understanding of sex as a "socially pluralistic and intersubjective" trait is a noteworthy correction to the past 50 years of judicial practice, which has unduly narrowed the scope of Title VII's protection.[12] Despite decades of sound medical evidence and widespread social recognition of sex as something more than a fixed binary trait, courts' historical reliance on the "biological" underpinnings of sex has facilitated a mode of judicial review that treats sex discrimination as a second-class claim, resulting in half a century of harsh government action punishing sexual minorities for their failure to conform to heteronormative expectations.[13]

As this correction to the traditional understanding of sex discrimination gained traction in the years leading up to the *Bostock* decision, the circuit split became so divisive that some district courts chose to reject binding precedent within their own

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[7] *Id.* at 1738.

[8] *Id.*

[9] *Id.* at 1744.

[10] *See* Karen Moulding, *Sexual Orientation and Employment Discrimination*, EMP. L. COUNS., Dec. 2006, at art. I, 2006 WL 3741833 (discussing barriers to relief for employment discrimination against gay, lesbian, and bisexual individuals).

[11] *Compare, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc), *with* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017), *and* Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019).

[12] *See* Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 747 (2020).

[13] *Id.* (classifying the emergence of "intermediate scrutiny" as a baseless restriction on judicial methodology for sex discrimination claims).

jurisdictions, citing persuasive precedent from other circuits to rule in favor of expanding the scope of Title VII's protection.[14] Still, the predominant trend has been to bar relief for sexual orientation and gender identity discrimination, largely on the theory that major changes to public policy should be driven by Congress, rather than left to the interpretation of an unelected judiciary.[15]

Notably, this widespread foreclosure on Title VII's application to sexual orientation and gender identity discrimination has also prevented bigotry against LGBTQ+ individuals from *gaining* legal protection under the guise of heterosexual discrimination. For example, in *O'Daniel v. Industrial Service Solutions*, the plaintiff filed a Title VII retaliation claim against her employer on the theory of (hetero)sexual orientation discrimination after she was fired in the wake of an incendiary Facebook post about transgender women.[16] Her claim was rejected chiefly because of "the exclusion altogether of 'sexual orientation' from the term 'sex' in the statute."[17] However, now that sexual orientation and gender identity are fair game under Title VII, the outcome of similar cases can no longer be assured.

For the purposes of deciding *Bostock*, the Court references previous expansions to the scope of the Civil Rights Act, citing instances where it has enlarged the meaning of sex discrimination over the past 50 years without altering the definition of "sex" as it was understood in 1964.[18] The common thread among these cases is the Court's willingness to include previously unforeseen aspects of discrimination based partially on sex within the scope of Title VII's protection. Rather than try to buck the common wisdom that Congress did not originally intend to include sexual orientation and gender identity within the scope of the statute, the Court highlights cases where similarly unintended outcomes have been subsequently accepted.[19]

II. ANALYSIS

A. The Majority Opinion's Methodological Limitations and Potential Barriers

Emphasizing its reliance on "the ordinary public meaning of the statute's language," the Court defines Title VII's relevant terms within the context of the time

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[14] *See, e.g.*, *Wittmer*, 915 F.3d at 333 (Ho, J., concurring).

[15] *See id.* at 338.

[16] O'Daniel v. Indus. Serv. Sols., 922 F.3d 299, 301 (5th Cir. 2019).

[17] *Id.* at 306.

[18] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1743–44 (2020); *see* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (recognizing sex discrimination where a male employee was sexually harassed by his male coworkers); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 709–10 (1978) (finding sex discrimination where an employer required women to pay more into their pension funds because women are likely to live longer than men); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (recognizing discrimination on the basis of motherhood as sex discrimination).

[19] *Bostock*, 140 S. Ct. at 1739, 1743–44.

they were written, articulating precise definitions of "sex," "because of," "discrimination," and "individual."[20] Justice Gorsuch uses these pieces of plain language to assemble a workable rule from the text of the statute: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[21] "[P]ut differently, if changing the employee's sex would have yielded a different choice by the employer[,]a statutory violation has occurred."[22]

Applying this rule, the Court concludes that discrimination on the basis of sex is an essential component of discrimination on the basis of homosexual or transgender status because sexual orientation and gender identity are inherently dependent on the plain meaning of "sex."[23] This is true for the same reason that you cannot draw a square without also having drawn a rectangle. And therein lies the elegance of the strategy applied by employees' counsel. Recognizing that the plain meaning of "sex" could not be bent under the watchful gaze of a conservative-leaning Court, they tailored their arguments to rely solely on the definition of "sex" as the term was ordinarily understood in 1964 by framing sexual orientation and gender identity discrimination in terms of "biological" sex.[24] And for a jurist as beholden to the statutory text as Justice Gorsuch, the result was all but unavoidable.

Developing this conception of the relationship between sexual orientation, gender identity, and "biological" sex, the Court teases out the subtle contours of its inherent logic with a variety of hypotheticals—all of which demonstrate that the characteristic to which the language of the statute attaches is not "sexual orientation" or "gender identity," but the "biological sex" of the person who is attracted to or identifies as a particular gender.[25] However, although the Court frames its opinion broadly, using the terms "sexual orientation" and "gender identity," it remains unclear whether the argument supporting its decision would apply in the same way to members of the LGBTQ+ community who are attracted to or identify as more than one gender, or no gender at all, such as asexuals, bisexuals, pansexuals, and agender, non-binary, or gender-fluid individuals.[26]

Applied to a person who identifies as bisexual, the Court's test demonstrating that homosexuality and transgender identity are fundamentally dependent on "biological" sex fails to establish the necessary connection, because such a person's attraction to members of both sexes remains constant, regardless of the biologically

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[20] *Id.* at 1738–41 (interpreting the statutory phrase "because of" to call for a broad, multifactor "but-for" test).

[21] *Id.* at 1741.

[22] *Id.*

[23] *Id.*

[24] Brief for Petitioner at 13, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

[25] *Bostock*, 140 S. Ct. at 1741–42, 1748–49.

[26] *Id.* at 1739.

sexual characteristics of the individual. A male who is bisexual remains bisexual if his "sex" is changed to female, which suggests that changing the sex of such an employee would not yield a different outcome and would fail to establish a statutory violation. Although the distinction may be irrelevant given the comprehensive terminology written into the Court's opinion, this potential deficiency in the legal argument used to reach its decision creates an ambiguity that could be creatively utilized to restrict the scope of *Bostock*'s protection to homosexual and transgender individuals exclusively, leaving out the larger LGBTQ+ community.

Recent scholarship advancing a "multiaxial approach" to sex discrimination offers a promising method of avoiding such problems if adopted by the courts.[27] This framework rejects the coupling of fixed binary traits with the strict causation analysis undertaken by the Court in *Bostock*.[28] By expanding their analyses beyond this "trait essentialism," where reference to "biological" sex-traits and heteronormative stereotypes is necessary to establish a link to the statutory language, courts would be able to unlock the full potential of Title VII's protections for the LGBTQ+ community as a whole.[29] Under this approach, courts would examine several different "axes"—each "represent[ing] a distinct viewpoint regarding the protected trait," to ensure an evidentiary and narrative balance that accounts for the diversity of perspectives on the nature of sexual orientation and gender identity.[30] Among the axes that could be considered in such cases are: the plaintiff's own conception of their sexual identity, the defendant's conception of the plaintiff's sexual identity, society's broader conception of the trait at issue, and any relevant legislative definitions that apply.[31] As proposed, rather than applying a causation analysis to the *trait* at issue to reach Title VII's protection, courts adopting this methodology would use the multiaxial approach to establish a connection to the statutory language and proceed to adjudicate the causation element on the basis of *facts*.[32]

Unfortunately, the analysis employed in *Bostock* declines to adopt this level of flexibility, requiring courts to rely on the strict binary of "biological" sex to establish sexual orientation and gender identity discrimination.[33] Because the Court's decision is underpinned by this causal connection between homosexuality, transgender identity, and "biological" sex, it is unlikely that courts will have the opportunity to substitute a multiaxial approach for the *Bostock* methodology anytime soon. Future sexual orientation and gender identity discrimination claims will be unable to establish this alternate theory of statutory linkage in the wake of a holding that rests on

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[27] Lin, *supra* note 12, at 769.

[28] *Id.*

[29] *See id.* at 770.

[30] *Id.*

[31] *Id.* at 770–71.

[32] *Id.* at 771.

[33] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739 (2020).

the connection between those traits and "biological" sex because courts will no longer need to address such arguments. In that sense, *Bostock* functions as a barrier; by providing a strict causation test, the Court forecloses the evolution of judicial methodology with regard to claims of sex discrimination.

B. The Dissents' Misconception of Sexual Orientation and Gender Identity

The employers' argument and the dissents' insistence that homosexuality and transgender identity can be defined, and therefore discriminated against, in isolation reveal the persistent misconception that the "biological" sex of an individual is separable from the sex of the people to whom they are attracted and the internal sense of gender they experience.[34] Although the Court discards these arguments, the dissents' failure to grasp this necessary relationship underscores the misunderstanding of sexual orientation and gender identity that remains alive within contemporary legal thought.

If Justice Alito had limited the scope of his opinion to a criticism of legislating from the bench or "updating . . . Title VII" to conform with contemporary beliefs, it could have been received as a measured response from a conservative jurist concerned about overstepping the authority of the Court.[35] In fairness, it is not an unreasonable critique of the Court's decision to argue that because Congress has considered legislation that would amend Title VII to include language that specifically addresses sexual orientation and gender identity, the Court should have refrained from deciding the issue under its own authority.[36] But to further argue that "[e]ven as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity,'" unmasks the ignorance underlying his position and undermines the impact of his dissent.[37]

Justice Alito contends that "[a]n employer can have a policy that says: 'We do not hire gays, lesbians, or transgender individuals.'"[38] Moreover, he argues, "an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants."[39] However, note that he inserts an additional element to obfuscate the issue: the employer's knowledge. In his view, the employer's lack of knowledge about the employee's "biological sex" gives them a pass to discriminate on the basis of sexual orientation and gender identity.[40] The problem with this position is that the legal issue has nothing to do with

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[34] *Id.* at 1757–58 (Alito, J., dissenting); *id.* at 1824 (Kavanaugh, J. dissenting). *See generally* Brief for Respondent, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

[35] *See Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting).

[36] *See id.* at 1755.

[37] *See id.*

[38] *Id.* at 1758.

[39] *Id.*

[40] *Id.*

the employer's knowledge about the employee's sex, as Justice Gorsuch's hypothetical about checking a box that identifies a job applicant as either Black *or* Catholic attempts to demonstrate.[41] However, the Court's illustration fails to capture the nuance inherent to sexual orientation and gender identity, since the prohibition against discrimination on the basis of both race and religion is explicitly enumerated in the text of the statute.

A more compelling example could have been constructed to quash this specious issue. Suppose an employer refuses to hire any applicant who indicates that Spanish is their native language. Ostensibly, such an employer has not discriminated against any characteristic directly prohibited under Title VII because language is not expressly mentioned in the statute. But in doing so, they cannot help but discriminate on the basis of race and/or national origin—despite the fact that they know neither the race of the applicant nor where they were born.[42] For similar reasons, it is sufficient that an employer discriminates against sexual orientation or gender identity because the question is whether discrimination on the basis of those traits necessarily includes discrimination because of sex. That question is answered not by the employer's knowledge, but by the characteristics of the employee that determine their sexual orientation or gender identity. And at least in *Bostock*, that determination could not be made without reference to their "biological" sex.

Conspicuously omitting gender identity from the scope of his dissent, Justice Kavanaugh follows suit, critiquing the Court's decision for impermissibly intruding upon the role of the legislature.[43] Quoting *The Federalist Papers* and invoking the separation of powers, his opinion emphasizes the "role [of] judges [] to interpret and follow the law as written, regardless of whether [they] like the result."[44] Ironically, he describes exactly what the Court has done in *Bostock* while himself relying on largely extraneous material to argue that the Court has overstepped its authority.[45]

Attempting to dismantle what he refers to as a "novel and creative argument"

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[41] *Id.* at 1746 (majority opinion); *id.* at 1759 (Alito, J., dissenting) (regarding the inability of an employer reviewing such an application to distinguish between the possibilities that the applicant is Black, Catholic, or both).

[42] This example better emphasizes that knowledge of the characteristic protected by Title VII is not required so long as it is a necessary condition of the trait being discriminated against.

[43] *Bostock*, 140 S. Ct. at 1823, 1823 n.1 (Kavanaugh, J., dissenting) (mentioning gender identity only insofar as to say that it would not be discussed separately because his "opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity").

[44] *Id.*

[45] *Id.* (citing other laws passed by Congress addressing unrelated employment discrimination issues); *see also* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

with linguistic sleight of hand, Justice Kavanaugh opines that the "ordinary meaning" of a term should not include its "literal definition" and that courts should limit their interpretation to the meaning of "statutory phrases," rather than individual "statutory term[s]."[46] The problem with this argument is that the Court *does* use the ordinary meaning of the statutory language to reach its decision. Thus, Justice Kavanaugh's criticism about interpreting terms too literally is really aimed at the employees' characterizations of "sexual orientation" and "gender identity." But neither of those terms are burdened with his insistence on interpretive restraint because they do not appear in the text of the statute, which is ultimately what he finds objectionable. Here, too, what ought to have been a moderate critique of the Court's decision is frustrated by its insistence that the Court was wrong. And it fails for the same simple reason: The Court got it right.

III. DISCUSSION

Although it is an unquestionably monumental victory for LGBTQ+ rights, the precedent established by *Bostock* could spark a backdraft of far-reaching, unintended consequences when considered in combination with a circuit court decision from 2019. Viewed in light of the Fifth Circuit's holding in *O'Daniel*, *Bostock* sets up the play for bigoted behavior against LGBTQ+ individuals to gain legal protection under the guise of heterosexual discrimination.[47] Although this potential misuse of the Court's decision is somewhat balanced by its direct correlation to the strength and breadth of Title VII's protections for the LGBTQ+ community as a whole, it remains a threat to the safeguards *Bostock* just enshrined.

On April 22, 2016, a human resources officer working at a company in Louisiana posted incendiary and pejorative remarks about transgender women on Facebook.[48] The post was discovered by her employers shortly thereafter and triggered immediate reprisals for the employee, resulting in an allegedly hostile work environment and culminating in her dismissal.[49] She sued her employers under Title VII, arguing that her termination was discriminatory retaliation against her sexual orientation.[50] Curiously, despite the complete absence of alleged facts supporting the conclusion that the plaintiff was discriminated against because she was heterosexual, the Fifth Circuit rejected her claim on grounds that Title VII did not prohibit sexual orientation discrimination.[51] As noted in the concurring opinion, it was unnecessary for the Fifth Circuit to reach the issue of sexual orientation discrimination to decide

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[46] *Bostock*, 140 S. Ct. at 1824–28.

[47] *See, e.g.*, O'Daniel v. Indus. Serv. Sols., 922 F.3d 299, 305–07 (5th Cir. 2019).

[48] *Id.* at 301–02.

[49] *Id.* at 302–03.

[50] *Id.* at 303 n.7.

[51] *See id.* at 307.

the case, because it could have been dispensed with by simply pointing out that Title VII does not "grant employees the right to make online rants about gender identity with impunity."[52]

Despite the severe legal deficiencies in the *O'Daniel* claim, the Fifth Circuit chose to rely on a contentious rule of law that was soon likely to change as grounds to dismiss the case.[53] In all likelihood, this decision was simply an expedient way for the Fifth Circuit to dispense with a meritless lawsuit, indicative of nothing more than an affirmation of precedent in its own jurisdiction—particularly given the widespread turbulence surrounding this issue.[54] However, the Fifth Circuit's choice to base its decision in *O'Daniel* on Title VII's failure to prohibit sexual orientation discrimination could also be interpreted as a calculated effort by a conservative-leaning circuit to stack the deck with specific outcomes in anticipation of the Supreme Court's ruling in *Bostock*.

Whether or not it was intentional, having rested its decision in *O'Daniel* on Title VII's failure to prohibit sexual orientation discrimination, the Fifth Circuit set the stage for a legal argument that uses Title VII to protect employees from retaliation for bigoted behavior. Indeed, district court decisions within its jurisdiction have already begun referencing the Fifth Circuit's holding that "the scope of [Title VII's] retaliation provision is dictated by the scope of Title VII's prohibitions."[55] And although the ruling by itself is not indicative of the implication, by reaching past the necessary legal issue and couching its decision in terms of sexual orientation discrimination, the Fifth Circuit has effectively created a legal avenue that could be used to shield bigots from the consequences of their prejudicial behavior.

By rejecting an otherwise meritless claim on the basis of Title VII's inapplicability to sexual orientation discrimination, the Fifth Circuit struck down the *O'Daniel* plaintiff's legal theory only for as long as those limitations on the scope of the statute's protection remained in effect. Now that those limitations have been lifted, similar cases that arise in the wake of *Bostock* will have the benefit of binding precedent legitimizing sexual orientation as a protected class, coupled with the backboard of a circuit court ruling that connects employment-related retaliation for bigoted behavior to the scope of Title VII's protection. With the right marriage of factual allegations, this combination could allow for a prohibition on employment-related retaliation for naked prejudice to gain legal traction in the form of heterosexual discrimination.

However, the ambiguity in *Bostock*'s holding—whether it applies broadly to

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[52] *Id.* at 309 (Haynes, J., concurring).

[53] *See id.* at 304–05 (majority opinion).

[54] *See id.* at 305.

[55] Welch v. Pepsi Co. Beverages Inc., No. 1:19-CV-40-SA-DAS, 2020 WL 1450550, at *2 (N.D. Miss. Mar. 25, 2020) (internal quotation omitted); *see, e.g.*, Davis v. United Health Servs., No. 1:18-CV-1093-RP, 2020 WL 33597, at *6 (W.D. Tex. Jan. 2, 2020).

sexual orientation and gender identity, or narrowly to homosexual and transgender individuals—will be a critical factor in determining the veracity of such an argument. Note that this ambiguity reveals a direct correlation between the breadth of *Bostock*'s protection and its potential for misuse. If heterosexual discrimination is covered under Title VII, then *Bostock* must also protect more than just homosexual and transgender individuals, encompassing the LGBTQ+ community in its entirety. If not, then it is possible that other groups within the LGBTQ+ community could be excluded from *Bostock*'s protection as well. This relationship creates a bit of a catch-22 for both liberal- and conservative-leaning circuits hoping to get as much as they can from the *Bostock* decision. Judges will be left with a choice: either rule that *Bostock* protects sexual orientation and gender identity broadly, opening the door to reverse discrimination of the *O'Daniel* variety, or interpret *Bostock*'s protection more narrowly and risk excluding other members of the LGBTQ+ community from the scope of Title VII's protection.

Either way, potential abuses of the *Bostock* decision represent a serious threat to the protections for LGBTQ+ individuals established by the Supreme Court. Particularly in combination with Justice Gorsuch's dictum suggesting that "substantially burdening a person's exercise of religion . . . . might supersede Title VII's commands in appropriate cases," it becomes evident that the scope of *Bostock*'s protection could be severely diminished going forward.[56] Exactly what kind of case might be considered "appropriate" remains unclear, but the underlying message suffers from no such opacity: *Bostock* explicitly leaves room for future cases to exclude Title VII protections for LGBTQ+ individuals on the basis of religious freedom. And when viewed in combination with the Fifth Circuit's ruling in *O'Daniel*, *Bostock* could also make it possible to prohibit employment-related retaliation for naked prejudice against LGBTQ+ individuals, if it can be successfully argued that bigoted behavior is a legitimate expression of heterosexual orientation and cisgender identity.

Incidentally, the multiaxial analysis advanced by recent scholarship could make it easier for such arguments to gain legal traction because it diversifies the perspectives that must be taken into account to reach Title VII's protection and it emphasizes reliance on the dissonance between multiple, subjective viewpoints to establish a basis for sex discrimination. Under this approach, the perspective of a heterosexual plaintiff of the *O'Daniel* variety—whose subjective experience of their own sexual orientation and gender identity includes prejudice against people who deviate from a heteronormative standard—would be entitled the same degree of deference as "a man who sincerely believed that he could identify as [gay] without repercussion at

[56] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020) (referencing the Religious Freedom Restoration Act of 1993 in its capacity "as a kind of super statute" to displace the operation of other federal laws).

his work."[57] Additionally, since the ambient attitudes reflective of "broader society" and localized legislative definitions will undoubtedly vary from place to place, a multiaxial approach has the potential to produce inconsistent application of Title VII's protection, because the weight and trajectory of the various "axes" will be heavily dependent on the prevailing perspectives in a given region.[58] For all its flaws, *Bostock* is, at the very least, consistent.

IV. CONCLUSION

Anticipating that attempts will be made to misuse the Court's decision in *Bostock* is not an unreasonable concern, given the malignant bias within contemporary legal discourse exposed by the dissenting opinions. Legal scholars and litigators alike should remain vigilant against attempts to distort progressive methodologies into serving narrow-minded ends. In *Bostock*, the limited characterization of sexual orientation and gender identity discrimination argued by employees' counsel gave the Court an opportunity to rubber-stamp a common-sense application of law that has been a long time coming. And the Court took what was offered.

Although it is too soon to tell what the long-term ramifications of this decision will be, the backdoor left open by the Court for the possibility of religious exemptions, as well as the landmark recognition of sexual orientation and gender identity as protected characteristics, could both be misused to protect prejudicial behavior. With the potential for legal battles on two fronts—free exercise of religion and reverse discrimination against heterosexual bigotry—the safeguards enshrined by the Court's decision in *Bostock* may not be as ironclad as they at first appear.

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[57] Lin, *supra* note 12, at 777.

[58] *See id.* at 770–71.