AMERICAN SOCIETY AFTER *BOSTOCK V. CLAYTON COUNTY*: WHAT NEXT?

An Undergraduate Research Scholars Thesis

by

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In *Bostock v. Clayton County* (hereafter, *Bostock*), the United States Supreme Court answered the legal question, "does Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII") encompass discrimination based on an individual's sexual orientation or gender identification?" Title VII, among other things, prohibits employment discrimination "because of . . . sex", a provision that prior to *Bostock* did not encompass sexual orientation or gender identification. However, the United States Supreme Court decided that the definition of "sex" within Title VII included sexual orientation and gender identification.

In his dissent, Justice Alito did little to hide his disappointment in the majority's refusal to consider how its decision would be interpreted in future cases involving similar laws prohibiting sex discrimination in areas outside the employment arena. Specifically, he questioned how future courts would consider segregated bathrooms and locker rooms and women's sports under Title IX of the Education Amendments of 1972 (hereafter, "Title IX"). Accordingly, these manuscripts intend to examine these issues.

Since *Bostock*, the lower courts have used its precedent in order to draw parallels between the application of "sex" under Title VII and the application of "sex" under another statute, namely Title IX. Comparing the two statutes, one can see pertinent similarities, which presumably have been the basis for the lower court's application of the *Bostock* precedent to Title IX cases.

Examining relevant cases before and after the *Bostock* decision provides an interesting analysis of how the law has changed concerning the definition of "sex" and its implications for the future. Title VII and Title IX are admittedly different statutes with different purposes, intended for different areas of the law; however, the courts have managed to cross-apply the interpretation of a vague term ("sex") from one to the other. This thesis will delve into nuances regarding how the courts undertook this cross-application. Additionally, this thesis will explore what the expansion of the interpretation of the term "sex" means for the future of our society. A discussion of the latter is undertaken regarding two pertinent issues: bathrooms and locker rooms and women's sports.

Winston Churchill once said, "[n]ow this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning." After the *Bostock* decision, many exclaimed with relief that the courts had finally answered the question definitively. However, a further understanding of the complications involved allows one to see that the end is not final with this decision. Everything we know about sex discrimination may come into question because of new policies and applications resulting from the inclusion of sexual orientation and gender identity in the definition of "sex."

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1. INTRODUCTION

In order to better understand the unexpected equivalating of Title VII's court-defined definition of "sex" to Title IX's definition of "sex," thorough knowledge of the wordings of each statute is required. The excerpts show distinct similarities in their lack of explanation behind the term "sex," and also differences in their ultimate purpose and contexts. Before delving into the court's utilization of *Bostock* to link the two statutes' definitions of sex, one needs to understand the statutes separately.

1.1 Title VII Excerpt

Title VII states that "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, **sex**, or national origin" (emphasis added).[1]

1.2 Title IX Excerpt

Title IX states that "no person in the United States shall, ***on the basis of sex***, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" (emphasis added).[2]

[1] 42 U.S.C. S.2000e, et seq.
[2] 20 U.S.C.1681-§1688

1.3 Linking Title VII and Title IX

Title VII and Title IX are ultimately different statutes intended for different purposes and applied to different areas of the law. Nevertheless, as will be exemplified, despite the statutes not being related, the courts have managed to cross-apply the interpretation of a vague term ("sex") from one to the other. The cross-application mentioned above became substantiated through the precedent set in *Bostock v. Clayton County*.[3]

1.4 Introduction to *Bostock v. Clayton County*

The two statutes, as mentioned earlier, were linked together through various cases that drew upon the precedent set in *Bostock*. In June 2020, the United States Supreme Court decided a controversial case that will continue to have untold implications on American society. Specifically, in *Bostock,*[4] the Court answered the legal question of "does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination 'because of . . . sex,' encompass discrimination based on an individual's sexual orientation or gender identification?"[5] The case before the Court was a compilation of three separate cases with the same basic fact pattern: an employer discharged a long-time employee with a short temporal correlation to when the employee allegedly revealed that he or she was homosexual/transgender. Each original plaintiff alleged that his/her employer made their decision for no reason other than the terminated employee's homosexuality/transgender status.[6]

A summary of the claims is set forth below:

[3] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).
[4] *Id*.
[5] *Id*.
[6] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1737-54 (2020).

1. Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate. After working for the employer for a decade, Bostock joined a gay recreational softball league. Influential community members allegedly began making disparaging comments about his sexual orientation and participation in the league. Soon after the comments, he was fired for conduct "unbecoming" of a county employee. After an adverse ruling in the District Court, the Eleventh Circuit Court of Appeals held that Title VII does not prohibit employers from firing employees for their sexual orientation and thus dismissed his lawsuit.[7]

2. Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay, and days later, he received notice of termination fired. However, unlike the Eleventh Circuit Court in Gerald Bostock's case, the Second Circuit Court of Appeals in Donald Zarda's case held that sexual orientation discrimination did violate Title VII of the Civil Rights Act of 1964 and allowed his case to proceed.[8]

3. Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she first started the job, she presented as a male. However, after her sixth year with the company, she was fired, purportedly because the company said, "this is not going to work out." The employment termination occurred shortly after she wrote a letter informing her employer that she planned to "live and work full-time as a woman." The Sixth Circuit Court of Appeals held that Title VII prohibits employers from firing employees because of their transgender status.[9]

[7] *Id.*
[8] *Id.*
[9] *Id.*

On appeal of each of these cases to the United States Supreme Court, a 6-3 majority held that employment discrimination based upon one's sexual orientation or gender identity is "sex discrimination" under Title VII.[10] In its decision, the majority held that "sex plays a necessary and undisguisable role" in the decision of an employer to fire an employee for simply being homosexual or transgender. The majority notes that sex playing such a role in an employer's decision is "exactly what Title VII forbids."[11]

The majority indicated that their decision found its roots in consideration of the "ordinary, contemporary, public meaning of each word and phrase" comprising Title VII. With this, the Court interpreted that an employer violates Title VII when it intentionally fires an individual employee based, at least in part, on sex.[12] The majority indicated that discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex.[13]

The Court's reasoning that discrimination against an applicant or employee because of his/her sexual orientation or because of his/her gender identity constitutes impermissible sex discrimination is relatively straightforward. On this note, the Court explained that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[14] Concerning sexual orientation, the Court provided the following example:

> "Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind

[10] *Id.*
[11] *Id.*
[12] *Bostock*,140 S.Ct. 1731, 1737-54 (2020).
[13] *Id.*
[14] *Bostock*,140 S.Ct. 1731, 1741 (2020).

> materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits to actions it tolerates in his female colleague."[15]

Similarly, with respect to a transgender employee:

> "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in a person identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."[16]

The Court's wordsmithing in this latter quote seems to be an attempt to avoid confusion with semantics. In the sexual orientation example, the Court could easily explain its "sex plus" rationale that an employer who fires a "man" who likes men and does not fire a "woman" who likes men is making a decision based on sex. However, this same man/woman designation proves more difficult in describing the transgender example.

The dissent, authored by Justice Samuel Alito and joined by Justice Clarence Thomas, criticized the majority for attempting to "pass off its decision as the inevitable product of the textualist school of statutory interpretation" instead of revising Title VII to "better reflect the current values of society."[17] In essence, Justice Alito and Justice Thomas stated that the Supreme

[15] *Id*.
[16] *Id*.
[17] *Bostock v. Clayton County*,140 S.Ct. 1731, 1755-84 (2020).

Court updated/created new legislation out of the old to reflect current cultural thinking rather than forcing the legislature to revise or pass new legislation to address the issue. Justice Brett Kavanaugh also authored a dissenting opinion arguing that, as written, Title VII does not prohibit discrimination on the basis of sexual orientation (or, by extension, transgender status).[18]

Aside from one's personal, religious, or political beliefs on the issues of homosexuality and transgenderism, the majority's opinion was a landmark decision. Prior to 2020, most federal courts held that homosexuality was not the same as "sex" under the meaning of Title VII. "Sex" was originally included as a provision in Title VII to stop this statute from being passed; thus, the irony of the "sex" protection becoming a vastly encompassing notion in modern times has not gone without notice.[19] So encompassing has *Bostock*'s new interpretation of "sex" become that in the time following the decision, courts have been quick to apply Title VII's new interpretation of "sex" to Title IX's definition of "sex." By examining cases before and after *Bostock*, it can be seen that courts have been readily applying *Bostock*'s interpretation of "sex" from Title VII to Title IX cases. The courts have been ready to make this application because of the two statutes' vague reference to "sex."

While the wording in Title VII and Title IX uses similar vague language concerning the meaning of "sex," the origins of the two statutes could not be more different. Title VII was enacted as a larger part of workplace discrimination laws passed by Congress. Title VII makes it unlawful to discriminate against an applicant or employee because of that person's race, color, religion, sex, national origin, age, disability, or genetic information.[20] Additionally, it is unlawful to retaliate against a person because he or she complained about discrimination, filed a charge of

[18] *Bostock v. Clayton County*,140 S.Ct. 1731, 1823-1837 (2020).
[19] MARIA L. ONTIVEROS, ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (9th ed. 2016).
[20] *Title VII of the Civil Rights Act of 1964,* EEOC, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

discrimination, or participated in an employment discrimination investigation or lawsuit.[21] In general, Title VII-type protections apply only in the employment context and must involve one of the protected class categories (race, color, religion, sex, and national origin).

On the other hand, Title IX was enacted as a part of the Education Amendments of 1972. As a result, Title IX has come to be known as a comprehensive federal statute that prohibits discrimination on the basis of sex in any federally funded education program or activity.[22] The principal objective of Title IX is to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens adequate protection against those practices.[23]

As mentioned, in the wording of Title VII and the wording of Title IX, there is no discernible difference between the two statutes regarding the protected class of "sex." Neither statute defines "sex" or "discrimination." Post-*Bostock*, the courts have shown a clear trend in their application of the *Bostock* interpretation of "sex" from Title VII to Title IX cases. This trend will undoubtedly have intriguing ramifications, some of which this paper will explore through the specific examples of bathrooms and locker rooms and women's sports.

Bostock is an example of how the law changes with society and reflects the attitudes and current beliefs of the people who follow it. Since this decision was unprecedented, there is a dearth of research regarding what it means for society. Justice Neil Gorsuch, writing for the majority, went so far as to note that the issues brought up by the Court's decision are not for the Supreme Court to handle now but that they will inevitably come up in the future.[24] Overall, this

[21] *Id.*
[22] Title IX and Sex Discrimination, U.S. Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
[23] *Id.*
[24] *Bostock*,140 S.Ct. 1731, 1737-54 (2020).

thesis will provide an in-depth analysis of the implications and expansion that the *Bostock* decision has already had and will have, on other laws in America, as demonstrated through the application to Title IX.

1.5 References

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).

Bostock v. Clayton County, OYEZ, 15 June 2020, https://www.oyez.org/cases/2019/17-1618.

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 1737-54 (2020).

Bostock v. Clayton County,140 S.Ct. 1731, 1755-84 (2020).

Bostock v. Clayton County,140 S.Ct. 1731, 1823-1837 (2020).

Maria L. Ontiveros, et al., Employment Discrimination Law: Cases and Materials on Equality in the Workplace (9th ed. 2016).

42 U.S.C. S.2000e, et seq.

20 U.S.C.1681-§1688

Title VII of the Civil Rights Act of 1964, EEOC, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

Title IX and Sex Discrimination, U.S. Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

2. BATHROOMS AND LOCKER ROOMS[25]

2.1 Abstract

Title IX cases have readily utilized *Bostock*'s expansive view of "sex" under Title VII since the Supreme Court's decision in 2020. Accordingly, lawsuits have been brought forward regarding the gender segregation of bathrooms and locker rooms. This manuscript discusses Title IX cases relating to the issue of bathrooms and locker rooms both prior to and following the *Bostock* decision. Since the Supreme Court decision, conflict has arisen because bathrooms and locker rooms have historically been an area under which the law allows for the different treatment of men and women. Now, with the more fluid interpretation of "sex" circulating the legal sphere, concerns about privacy and safety in such spaces will inevitably arise.

Consider a rather complicated situation faced by the Seattle Parks and Recreation Department before *Bostock* expanded the definition of "sex." According to USA Today, a man undressed in a women's locker room, citing a new state rule that allows people to choose a bathroom based on gender identity.[26] The man entered the women's locker room at a public pool and took off his shirt. When women in the locker room alerted the staff, the man insisted that the law had changed and he had every right to be there.[27] Although the change in the law was an attempt by Seattle to be more inclusive and have patrons feel welcome, the attention the law brought is potentially working against the point the city was trying to make. In a sense, even though the new law intended to reduce the number of people who feel exposed and vulnerable, in

[25] General Note: The discussion of bathrooms and locker rooms and women's sports only involves transgenders and *not* homosexuals.
[26] Allison Morrow, "Seattle man tests transgender rule by undressing in women's locker room," *USA Today*, 17 February 2016, https://www.usatoday.com/story/news/nation-now/2016/02/17/transgender-rule-washington-state-man-undresses-locker-room/80501904/
[27] *Id.*

reality, it may be causing people to feel more exposed and vulnerable.[28] The city is still working on the issue, though there is no specific protocol for how someone should demonstrate their gender to access a public bathroom/locker room.

The cross-application of the *Bostock* definition of sex from Title VII to Title IX has far-reaching implications and sets the stage for several controversies. Taking a broader perspective, the inclusion of transgenderism as a form of sex discrimination has emerged as a matter of concern to individuals who are already apprehensive about getting undressed or using restroom facilities in the company of what they perceive as the opposite sex. The fact that most transgender people have the genitalia of their birth primes this concern. Admittedly, this concern may be rooted in the notion of comfortability. However, the impact may be more extensive and harmful to those who have experienced prior physical or sexual assault/abuse.[29] The psychological harm of viewing a member of the opposite sex in a private location such as a bathroom or locker room is a tantamount concern for many.[30] An analysis of pre-*Bostock* and post-*Bostock* lower court cases in which the issue has been addressed will show how this expansion of the definition of "sex" is rapidly dispersing throughout the legal realm.

2.2 Introduction

This manuscript will discuss the application of the new interpretation of "sex" from *Bostock* and Title VII to Title IX in the area of bathrooms and locker rooms. First, a discussion using relevant past cases and their precedents will explain where the law and its interpretation of "sex" were before *Bostock.* A look at the past provides a foundation for understanding *Bostock.* Past cases also show how the law has changed over time to bring us to the present. The

[28] *Id.*
[29] *Bostock*,140 S.Ct. 1731, 1737-54 (2020).
[30] *Id.*

discussion will then analyze where the law is currently via an in-depth exploration of the outlook/current law regarding bathrooms and locker rooms using Title IX cases that address the issue post-*Bostock*. Overall, this manuscript will culminate in recognizing how the law has changed regarding bathrooms and locker rooms, focusing on how the courts have applied findings to Title IX. The final section of this manuscript will involve a description of the implications of *Bostock* on the sex segregation standard in bathrooms and locker rooms throughout the legal realm of the United States and American society at large.

2.3 Pre-*Bostock*: The Law

Prior to *Bostock*, the pertinent case law viewed the coupling of gender orientation and transgenderism with bathrooms/locker rooms in a negative light. As a result, courts consistently ruled against individuals whose discrimination claims were founded on their inability to use bathrooms and locker rooms that were segregated according to biological sex. Three cases, dated prior to the 2020 ruling in *Bostock*, exemplify this trend: *Johnston v. University of Pittsburgh of Com. System of Higher Educ.*,[31] *M.A.B. v. Board of Education of Talbot County*,[32] and *Evancho v. Pine-Richland School District*.[33] Each of these courts issued decisions indicating transgenderism is not a valid claim of discrimination regarding sex-segregated bathrooms and locker rooms. It should be noted, however, that another case, *Doe by and through Doe v. Boyertown Area School District*,[34] went against the tide and ruled in favor of transgender individuals and their right to have access to bathrooms and locker rooms in accordance with their gender identity.

[31] *Johnston v. University of Pittsburgh of Com. System of Higher Education*, 97 F.Supp.3d 657, 661-62 (W.D. Pa. March 31, 2015).
[32] *M. A. B. v. Board of Education of Talbot County*, 286 F.Supp.3d 704, 708 (D. Md. March 12, 2018).
[33] *Evancho v. Pine-Richland School District*, 237 F.Supp.3d 267, 272-74 (W.D. Pa. Feb. 27, 2017).
[34] *Doe by and through Doe v. Boyertown Area School District*, 897 F.3d 518, 521-38 (3d Cir. 2018).

In *Johnston v. University of Pittsburgh of Com. System of Higher Education*, a transgender university student, brought an action against the university and its employees following his expulsion. The claimant had faced expulsion because he refused to stop using the male-designated locker room and bathroom facilities. He alleged that he experienced discrimination based on his sex and his transgender status and that the discrimination violated Title IX and the Equal Protection Clause.[35] The court determined that the transgender student's Equal Protection Clause claim was to be reviewed under the less restrictive rational basis standard. The court's reasoning derived from the transgender student's university's refusal to allow him to use a male-designated locker room and bathroom facilities since "transgender status" was not a specific classification under the Equal Protection Clause.[36] Under this standard of review, the expulsion was found to be lawful.

The student, in this case, could also not maintain a Title IX discrimination claim against the university based on his transgender status.[37] The court highlighted the notion that Title IX's prohibition on discrimination "on the basis of sex" only referred to the traditional binary conception of sex consistent with one's birth or biological sex. The majority writes that "prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals."[38] With this in mind, the court concluded, "if the term "sex" as used in Title VII means more than biological male or biological female, the new definition must come from Congress."[39] The court maintained that this determination found

[35] *Johnston v. University of Pittsburgh of Com. System of Higher Education*, 97 F.Supp.3d 657, 661-62 (W.D. Pa. March 31, 2015).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

support in the statute's legislative history and federal regulations that explicitly allowed educational institutions to provide separate locker room and bathroom facilities based on sex.[40]

In *M.A.B. v. Board of Education of Talbot County*, an individual designated biologically female at birth, but maintained a male gender identity, brought an action against the school board, alleging claims under Title IX, the Equal Protection Clause, and the Maryland Declaration of Rights.[41] He claimed harm via illegal, discriminatory effects resulting from his not being allowed to use the boys' locker rooms on the same terms as male students. The court found that the board of education policy barring an individual from boys' locker rooms who was designated female at birth but identified as a male did not have exceedingly persuasive justification.[42]

In the end, the court ultimately held that because the supposed harm from the board of education policy was not actual and imminent, the plaintiff would not be entitled to a preliminary injunction.[43] The court's decision was rooted in the fact that the plaintiff was not enrolled in any class for the current school year that would have required the use of locker rooms. The court added that because he did not need the locker room for any other purpose, the claim that he had experienced discrimination was irrelevant.[44] Being pre-*Bostock*, the court, in this case, found an issue with trying to expand the coverage of Title IX and noted that the Supreme Court has never addressed how Title IX applies to transgender individuals. Thus, it is not for the courts to decide. Here, the court found a technical way around answering the question, thus evading the issue and leaving it for another time. Though this case does not rule entirely against the plaintiff's right to use the restroom, it exemplifies the court's reluctance to allow it definitively.

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[40] *Id.*
[41] *M. A. B. v. Board of Education of Talbot County*, 286 F.Supp.3d 704, 708 (D. Md. March 12, 2018).
[42] *Id.*
[43] *Id.*
[44] *Id.*

Evancho v. Pine-Richland School District[45] echoes the sentiment in the cases described thus far. The issue here concerns public high school students who identified as transgender. The three students filed a suit against the school district, claiming a violation of the Equal Protection Clause and Title IX. The students' claims were based on the school board's new resolution, limiting transgender students to either single-user school bathrooms or school bathrooms labeled as matching their sex assigned at birth. The students desired to have the ability to use bathrooms per the gender identity that they had expressed and lived during their high school years.[46] Ultimately, the court held that the necessary showing of likely success on the merits of the plaintiffs' Title IX claim could not be sufficiently made. Accordingly, the plaintiffs failed because the issue's law is clouded with uncertainty and, therefore, the injunctive relief request on Title IX grounds was denied.[47]

Though the previous three cases prove that courts prior to *Bostock* trended toward not allowing the term "sex" to include sexual orientation and gender identity, the divergent case of *Doe by and through Doe v. Boyertown Area School District*[48] shows that a change in mindset was forthcoming. In *Boyertown*, a group of cisgender high school students, by and through their parents and guardians, brought an action against their school district superintendent and school principal. The group alleged that the school district's practice of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated the cisgender students' right to privacy under the Fourteenth Amendment, their right of access to educational opportunities, programs, benefits, and activities under Title IX, and their Pennsylvania common

[45] *Evancho v. Pine-Richland School District*, 237 F.Supp.3d 267, 272-74 (W.D. Pa. Feb. 27, 2017).
[46] *Id.*
[47] *Id.*
[48] *Doe by and through Doe v. Boyertown Area School District*, 897 F.3d 518, 521-38 (3d Cir. 2018).

law right of privacy preventing intrusion upon their seclusion while using bathrooms and locker rooms.[49]

Under these claims, the plaintiffs sought a preliminary injunction requiring the school district to return to its prior practice of requiring all students to only use the private facilities corresponding to their biological sex. In this case, the Third Circuit affirmed the district court's ruling, which denied the requested injunction based on the conclusion that the plaintiffs had not shown that they were likely to succeed on the merits. Ultimately the court could not foresee that the plaintiffs would be irreparably harmed without the injunction.[50] A case that sets itself apart from the standard court rulings on this issue, *Boyertown* proves that the courts evolve and do not always agree to apply the same standards to similar issues. *Boyertown* may be one of the cases that paved the way for the Court's recent cross-application of *Bostock*'s new definition of "sex" from Title VII to Title IX.

These four cases, taken in totality, provide a glimpse into how the law was interpreted regarding gender orientation and transgenderism prior to *Bostock*. Considering that three of the four cases looked favorably upon policies allowing for the segregation of bathrooms and locker rooms following biological sex, it can be surmised that most case law interpreted gender orientation and transgenderism as not having a solid hold within the law. However, one should take note that the issue did not solely point in one direction, as exemplified by the case of *Doe by and through Doe v. Boyertown Area School District*. There was indeed an acknowledgment of gender orientation and transgender rights in bathroom and locker room use prior to *Bostock*. This whisper may be why the courts have recently been so apt to expand the definition of "sex."

[49] *Id*.
[50] *Id.*

2.4 Post-*Bostock*: The Law

While there has not been an overwhelming number of cases dealing with the issues of gender orientation and transgenderism in relation to bathrooms and locker rooms since the *Bostock* decision, there are a few upon which we can draw conclusions. The few that have been brought forward and decided, and which have used *Bostock* as precedent provide a glimpse into where the law is currently sitting. Furthermore, these cases provide a comparative basis for how the law has changed as well as a glimpse into where the law is going. Four notable cases, again rooted in Title IX, have been decided since the *Bostock* decision was made in June of 2020: *Grimm v. Gloucester County School Board*,[51] *Adams v. School Board of St. Johns County, Florida*,[52] and *N.H. Lucero v. Anoka Hennepin School District*[53] are all brought into the discussion to provide context regarding just how widespread the precedent set by *Bostock* has been.

Grimm v. Gloucester County School Board concerns a transgender male student who brought an action against his school district, alleging that its policy requiring students to use bathrooms based on their biological sex, and its refusal to amend his school records to reflect his gender identity, violated the Equal Protection Clause and constituted discrimination on the basis of sex in violation of Title IX.[54] Upon appeal from the District Court's grant for summary judgment in favor of the student, the Court of Appeals affirmed the District Court's judgment. The Court of Appeals reasoned that the school board's refusal to amend the student's records to reflect his male gender was, in fact, discrimination on the basis of sex in violation of Title IX.[55]

[51] *Grimm v. Gloucester County School Board*, 972 F.3d 586, 593-98 (4th Cir. 2021).
[52] *Adams v. School Board of St. John's County, Florida*, 968 F.3d 1286, 1297 (11th Cir. 2020).
[53] *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 557-84 (Minn. Ct. App. Sept. 28, 2020).
[54] *Grimm v. Gloucester County School Board*, 972 F.3d 586, 593-98 (4th Cir. 2021).
[55] *Id.*

Relying on *Bostock*, the court determined that when discriminating against a person for being transgender, the discriminator necessarily refers to the individual's sex to determine incongruence between sex and gender. This reliance makes it impossible to discriminate against a person for being transgender without discriminating against that individual based on sex.[56]

Adams v. School Board of St. John's County, Florida, is a similar case decided in the year after *Bostock*. In this case, a transgender student who identified as male brought an action against the county school board, alleging that his rights under the Equal Protection Clause and Title IX were violated by bathroom policy, which prevented him from using the boys' bathroom at the county high school.[57] Again, the district court and the Court of Appeals interpreted the school board's policy to violate the student's rights – specifically his equal protection rights.

N.H. & Lucero v Anoka-Hennepin School District is yet another case involving a transgender high-school student denied use of facilities based on the conflict between their birth sex and the one with which they identify. In this case, the school denied the transgender student access to use locker rooms available to students of the gender with which the student identifies and to which the student has socially transitioned.[58] Relying on the *Bostock* precedent, the court determined that the student has a valid claim upon which relief is to be granted due to sexual orientation discrimination.[59]

These three cases build upon each other and the law's direction regarding transgenderism and gender identity since the *Bostock* case. They provide a basic understanding of where the laws currently are now. An interesting shift from a close-minded attitude about transgenderism and gender identity to a more open-minded attitude has occurred within American society when

[56] *Id.*
[57] *Adams v. School Board of St. John's County, Florida*, 968 F.3d 1286, 1297 (11th Cir. 2020).
[58] *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 557-84 (Minn. Ct. App. Sept. 28, 2020).
[59] *Id.*

considering the usual practice of segregating bathrooms, changing rooms, and locker rooms per an individual's biological sex. Research on post-*Bostock* cases regarding the use of bathrooms and locker rooms has yielded a majority of cases putting forth the ruling that *Bostock* is a valid precedent. Therefore, a ripple effect is seen. While it was previously (pre-*Bostock*) confirmed that most of the law interpreted the issue of gender orientation and transgenderism as not having a firm hold in the legal realm, the interpretation has shifted, and this issue now has a proper hold. Not only does the expansion have prominence in Title VII situations, the expansion has also firmly found itself valid in an entirely separate statute, namely Title IX.

2.5 How the Law Has Been Changed in This Area

The shifting in ideals and values that can be seen through the pertinent case law discussed throughout the pages of this manuscript proves the age-old notion that law is an embodiment of society. Law is defined by society, and even though we are bound to follow the rules set forth in our legal system, it is the people within the society who define law, not the other way around. Prior to the Supreme Court's ruling in *Bostock,* courts were fairly adamant about keeping transgenderism and gender identity issues separated from society's norm of segregating bathrooms and locker rooms according to the two biological sexes.

As time passed and society's values changed, there was a push for the legal term "sex" to be more inclusive of transgenderism and gender identity. The push was not simply confined to one piece of legislation either (Title VII), as it has been influential in the wholly separate statute of Title IX. Society's push for the expansion in the legal definition of "sex" thus provided a reason why out of the numerous cases the Supreme Court gets requests to hear each year, they decided that *Bostock* was an issue salient enough to warrant their input. Now, with *Bostock* as a relevant precedent, courts are using the precedent to open up bathrooms and locker rooms to

individuals on the basis of transgenderism and gender identity even though bathrooms and locker rooms are areas ruled by a separate statute, namely Title IX.

2.6 Where the Law is Going

It appears that federal judges will continue this trend of opening bathroom and locker room segregation policies. Therefore, both schools and employers in the United States should note how the law has changed concerning bathroom and locker room policies and what it could mean for them.[60]

Schools may be interested in including gender identity and expression in their Title IX, nondiscrimination, and conduct policies. In addition, schools and administrators may need to begin reviewing all documents, forms, records, and online information to ensure the use of that gender-inclusive language and options. They additionally need to ensure that the approach is consistent across school departments.[61] With regard to bathroom and locker room access, the consideration of a policy that would permit a transgender student or employee to use facilities aligned with their gender identity, as seen in the cases above, will undoubtedly be a requirement. At a minimum, they may be able to circumvent this trend by making a sufficient number of single-user options available to all students and employees who voluntarily seek additional privacy.[62] Such bathrooms would have to employ gender-neutral labeling with clear designation on campus maps. It may also be critical to provide training for appropriate school officials on issues relating to gender identity.[63]

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[60] *EEOC Issues LGBTQ+ Restroom Guidance On One-Year Anniversary of Bostock*, HUNTON EMPLOYMENT AND LABOR PERSPECTIVES, 24 June 2021, https://www.huntonlaborblog.com/2021/06/articles/eeoc-developments/eeoc-issues-lgbtq-restroom-guidance-on-one-year-anniversary-of-bostock/.
[61] *Id.*
[62] *Id*.
[63] *Id*.

Employers have to be just as abreast on these issues as schools because the Equal Employment Opportunity Commission's (EEOC) position maintains that employers may not bar applicants or employees from using bathrooms or locker rooms that correspond to their gender identity.[64] The EEOC has reiterated that an employer may not use co-workers' anxiety, confusion, or discomfort to justify discriminatory policies.[65] While the EEOC's guidelines are not hard law, federal courts tend to use them as frameworks when deciding on relevant issues, so adhering to them is generally the best practice in the employment realm.

Perhaps the most interesting thing about the EEOC's guidance is not the content but how the guidance was issued. The current EEOC Chair, Democrat Charlotte Burrows, issued the guidance unilaterally, without a vote by the five-member EEOC panel. The three majority Republican Commissioners have criticized the guidance, saying it goes beyond the scope of the *Bostock* decision.[66] The strong criticism means that the guidance has the potential for reversal when there is a new EEOC Chair. Noting this is striking because it further strengthens the idea that law morphs and changes and may even go back and forth on specific issues as society changes and governance leaders change.

2.7 Conclusion

Bostock has provided a solid foundation for a wave of change that will continue for the foreseeable future. The examples of how the law has expanded to apply Title VII's interpretation of "sex" to Title IX cases involving bathrooms, and locker rooms tell how society's values are changing. As with most social phenomena, the discussion cannot be conclusive as to whether this trend will continue or not, seeing as society's values are constantly evolving. The evolution of

[64] *Id.*
[65] *Id.*
[66] *Id.*

values brings a notable change in the law because the relationship between society's values and the law ebbs and flows. What might be true today has the potential to be usurped tomorrow.

2.8 References

Allison Morrow, "Seattle man tests transgender rule by undressing in women's locker room," USA Today, 17 February 2016, https://www.usatoday.com/story/news/nation-now/2016/02/17/transgender-rule-washington-state-man-undresses-locker-room/80501904/

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731

M. A. B. v. Board of Education of Talbot County, 286 F.Supp.3d 704, 708 (D. Md. March 12, 2018).

Evancho v. Pine-Richland School District, 237 F.Supp.3d 267, 272-74 (W.D. Pa. Feb. 27, 2017).

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Grimm v. Gloucester County School Board, 972 F.3d 586, 593-98 (4th Cir. 2021).

Adams v. School Board of St. John's County, Florida, 968 F.3d 1286, 1297 (11th Cir. 2020).

N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 557-84 (Minn. Ct. App. Sept. 28, 2020).

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3. WOMEN'S SPORTS[67]

3.1 Abstract

Before discussing women's sports prior to *Bostock,* whether the courts will continue to trend toward equating Title VII with Title IX should be pondered. Additionally, whether or not the courts will apply the cross-application discussed via bathrooms and locker rooms in women's sports has significant implications for the future application of the *Bostock* precedent.

The new interpretation of "sex" brought forth from the *Bostock* decision has brought to light a concern regarding fairness within women's sports in America. For example, how will the law now reflect the right of a transgender individual to participate on a sports team or in an athletic competition that had up until the *Bostock* decision been reserved for members of one specific biological sex? As noted by Justice Alito in his dissenting opinion in *Bostock,* this concern has "already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports."[68] How will American citizens react? How will adjustments be made to account for every individuals' rights in this regard? These questions are concerns that the judicial system faces when interpreting the *Bostock* decision for future applications of its precedent. Analyzing lower court cases in which the issue has been addressed will provide a complete picture of this issue and whether or not the courts view the Title VII interpretation of "sex" as cross-applicable to Title IX.

[67] General Note: The discussion of bathrooms and locker rooms and women's sports only involves transgenders and *not* homosexuals.
[68] *Bostock*, 140 S.Ct. at 1754-84.

Consider the example of Lia Thomas, a transgender swimmer who swims for her college's female team. Thomas, a member of the University of Pennsylvania women's swimming team, recently broke two swimming records at an Akron, Ohio, meet.[69] First, Thomas won the 1,650 freestyle in a record time of 15:59.71, beating her closest rival, Anna Sofia Kalandaze, by an astonishing 38 seconds.[70] Additionally, she left rivals floundering in a 500-freestyle, beating them by 14 seconds.[71]

A curious note lay in that Thomas previously competed for the school's men's team for three years before joining the women's team.[72] She did not have much success while on the men's team. The National Collegiate Athletic Association rules dictate that any trans female athlete can participate in women's events if they have completed a year of testosterone suppression treatment.

Some may argue that she has an unfair physiological advantage. In contrast, others may argue that she should be allowed to compete freely as a woman in the interest of transgender rights. This latter argument is one which the courts tend to agree with, utilizing Title IX to enforce these rights. Notably, the purpose of Title IX is to create equality in collegiate sports for men and women. Understanding the purpose thus begs the question: are transgender allowances in collegiate sports going against Title IX's intent?

3.2 Introduction

This manuscript will explore the implications and concerns within women's sports in the short time following the *Bostock* decision. First, an analysis of the cases pertaining to

[69] Jack Dutton, "Who Is Lia Thomas? Trans Swimmer Breaking College Records Sparks Debate," *Newsweek*, 8 December 2021, https://www.newsweek.com/trans-swimmer-breaking-college-records-sparks-debate-1657354
[70] *Id.*
[71] *Id.*
[72] *Id.*

transgenderism as it relates to participation in women's sports prior to *Bostock* will provide an understanding of where the law used to be. To be discovered is the dearth of cases in this area prior to *Bostock*. Looking at the past will provide foundational knowledge to help further understand how the law has changed over time. The discussion will then assess where the law is currently via an in-depth exploration of the outlook/current law regarding women's sports and the ramification the newly expansive view of "sex" as a protected class will have on the matter. This assessment involves the use of cases that address the issue post-*Bostock*.

This manuscript will develop a conscious understanding of how the law has changed concerning women's sports and the rights afforded to women athletes, both from a trans- and cisgender woman's perspective. Additionally, the text herein will discuss the implications of the further cross-application of Title VII's interpretation of sex to Title IX. Finally, this document will culminate in a discussion regarding the future impact of *Bostock* on the realm of women's sports in American society.

3.3 Pre-*Bostock*: The Law

Prior to *Bostock,* the courts did not hear many cases on the issue of transgender women participating in women's sports. Interestingly, the issue was not contentious until after the Supreme Court's controversial ruling in *Bostock*. Various cases have been filed since *Bostock* whereby transgender individuals assert their newfound rights. The lack of prior case law on this issue is highly telling. More specifically, individuals tended to view the statutory provision as excluding the rights of transgender individuals to participate in sports that comply with their gender identity. Furthermore, there was not an overwhelming push for inclusion on this issue prior to *Bostock*.

Although history shows a paucity of transgenderism and women's sports cases, transgender students' participation in athletics has always divided students, parents, states, and school districts. When considering federal statutory law, the debate centers on Title IX, which prohibits recipients of federal financial assistance from discriminating based on sex in educational programs.[73] The majority of public-school districts and universities in the United States receive at least some form of federal funding. Therefore, they must comply with Title IX if they do not want to risk losing federal funding. The notable provision of the statute causing confusion explicitly prohibits discrimination "because of ... sex." The provision prohibiting sex discrimination is silent on whether the term includes a person's asserted gender identity or otherwise prohibits discrimination against transgender students.[74] A similar confusion lies in Title VII's prohibition against sex discrimination in employment. The issue appears to have been cleared up in the aftermath of *Bostock*. According to *Bostock*, in the employment context, "sex" as a protected class includes a person's asserted gender identity and prohibits discrimination against transgender individuals. The fact that Title IX and Title VII contain very similar provisions prohibiting discrimination based on "sex" shows how a ruling under one can impact the interpretation of the other.

3.4 Post-*Bostock*: The Law

More cases have involved a transgender woman's rights in participating in women's sports post-*Bostock*. The lack of cases prior to *Bostock* paints a particularly relevant picture because the silence on the subject allows for a straightforward interpretation. The lack of literature indicates that society did not hold much concern about transgender involvement in

[73] *Title IX's Application to Transgender Athletes: Recent Developments*, CONG. RSCH. SERV. LEGAL SIDEBAR, 12 August 2020, https://www.hsdl.org/?view&did=842650.
[74] *Id.*

women's sports. Looking at cases post-*Bostock* can provide deep insight into where the law currently resides regarding women's sports in relation to the newly formed interpretation of the protected class of "sex" under Title VII. The relevant cases to be discussed here will provide a firm base for exploring how the law has changed in this area, allowing for insight into where the law is going.

The discussion of three salient cases which have been decided, relying on the *Bostock* precedent, is pertinent to understanding where the law may be headed. These cases delve into concerns within women's sports regarding transgender participation and what that means for organized sports in American society. Since the *Bostock* decision was finalized, the courts have heard and decided the cases of *Hecox v. Little,*[75] *B.P.J. v. West Virginia State Board of Education,*[76] and *Soule by Stanescu v. Connecticut Association of Schools, Inc*.[77] The cases mentioned above all provide the relevant context within which an analysis of the current law can occur.

In *Hecox v. Little,* the issue of transgenderism in women's sports is highlighted from many facets. The plaintiffs, in this case, challenged the constitutionality of a new Idaho law which excluded transgender women from participating in women's sports teams.[78] Here, a transgender woman athlete who was enrolled in a state university and intended to try out for women's cross-country and track teams filed suit against the state of Idaho, challenging *Idaho's Fairness in Women's Sports Act*.[79] The plaintiffs claimed that the Act allegedly violated the Equal Protection Clause and Title IX by categorically barring transgender women from

[75] *Hecox v. Little*, 479 F.Supp.3d 930, 944-48 (D. Idaho Aug. 17, 2020).
[76] *B. P. J. v. West Virginia State Board of Education*, No. 2:21-cv-00316, 2021 WL 3081883, at *2 (S.D. W.Va. Jul. 21, 2021).
[77] *Soule by Stanescu v. Connecticut Association of Schools, Inc*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).
[78] *Hecox v. Little*, 479 F.Supp.3d 930, 944-48 (D. Idaho Aug. 17, 2020).
[79] *Id.*

participating in women's sports teams. The law established a dispute process that allowed other individuals to challenge the student athlete's sex, requiring the student to undergo a potentially invasive sex verification process. The law created an avenue for private causes of action against schools for any student who was deprived of athletic opportunity or suffered any harm due to the participation of transgender women on women's teams. Additionally, the law precluded schools from retaliating against those reporting violations of the Act. This anti-retaliation policy does not depend on whether the report was made in good faith or to harass a competitor.[80] The court agreed to a preliminary injunction against the Act, remanding the case back to the district court for further consideration. This injunction allowed Hecox to try out for the women's team. The appellate court recognized that providing an injunction would be an impactful precedent in this case. The majority opinion noted that providing an avenue for a transgender student to try out for a team not corresponding to biological sex impacts not just the constitutional rights of transgender girls and women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho.[81]

In *B.P.J v. West Virginia State Board of Education*, a transgender female student brought an action against the state of West Virginia. The student alleged that state law, which required athletic teams to be designated based on biological sex, violated the Equal Protection Clause and Title IX.[82] The court, in this case, determined that B.P.J.'s exclusion from school athletics based on her sex was apparent. The court drew on *Bostock* to maintain that there is little difficulty in holding that the state's law discriminates against B.P.J. "on the basis of sex."[83] The state law

[80] *Id.*
[81] *Id.*
[82] *B. P. J. v. West Virginia State Board of Education*, No. 2:21-cv-00316, 2021 WL 3081883, at *2 (S.D. W.Va. Jul. 21, 2021).
[83] *Id.*

could not exclude B.P.J. from a girls' athletics team without referencing her "biological sex" as defined in the statute; thus, her sex "remains a but-for cause" of her exclusion under the law.[84] Using *Bostock*'s precedent, the court turned to B.P.J.'s Title IX claim. The court considered whether the law unlawfully discriminates against B.P.J. in the Title IX context, "discrimination mean[s] treating that individual worse than others who are similarly situated."[85] The court determined that, in this case, B.P.J. would be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity. The final holding of the court was in favor of B.P.J. and her Title IX claim.[86]

Turning to *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, it can be seen that at present, courts are steadfastly holding to the expansive view of sex being inclusionary of transgenderism and gender identity. This case involved a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference (CIAC), the governing body for interscholastic athletics in Connecticut. The participation policy permitted high school students to participate in sex-segregated sports consistent with their gender identity. The plaintiffs claimed that the CIAC policy puts cisgender girls at a competitive disadvantage in girls' track events and, as a result, denies them rights guaranteed by Title IX of the Education Amendments of 1972.[87] The plaintiffs contended that the school's implementation of regulations required that if a school provides athletic programs or opportunities segregated by sex, it must do so so that it "[p]rovides equal athletic opportunity for members of both sexes,"[88] was unfair.

[84] *Id.*
[85] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).
[86] *Id.*
[87] *Soule by Stanescu v. Connecticut Association of Schools, Inc*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).
[88] 34 C.F.R. § 106.41(c).

The court focused on the fact that the plaintiffs did not meet the mootness standard (requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence). The court maintained that there was no indication that the plaintiffs would encounter competition from a transgender student in a CIAC-sponsored event next season.[89] Indeed, the defendants' counsel demonstrated that they did not know of any transgender girl who would be participating in girls' track at that time. The court was careful to mention that there was still theoretically a possibility that a transgender student could attempt to participate in the track events. However, a legally cognizable injury to these plaintiffs would depend on a transgender student running in the same events and achieving substantially similar times.[90] They firmly held that such "speculative contingencies" were insufficient to satisfy the case. The court concluded that the plaintiffs' challenge to the CIAC policy was not justiciable at this time.[91]

3.5 How the Law has Been Changed

The shift from a scarcity of filed suits in the area of transgenderism and women's sports to the issue being brought up more readily in court cases proves an initial change in society's attitude towards transgender girls and women participating in sports teams corresponding to their gender identity. As a result, individuals appear to be more apt in asserting their rights. Once the Supreme Court had provided a subtle crack to work with through *Bostock*, people have pushed the door wide open to apply the case's newfound definition of "sex" to untold statutes and legal areas. It appears as though pre-*Bostock*, either individuals did not believe that they had relevant standing when faced with discrimination in sports because of their transgender status or that

[89] *Soule by Stanescu*, 2021 WL 1617206 at *5.
[90] *Id.*
[91] *Id.*

society was firmly against changing the status quo of biological sex segregation in sports. At present, individuals are utilizing the precedent set in *Bostock* to gain access to sports based on their gender identity. Additionally, society is coming to accept the rights of transgender individuals, breaking the sex-segregated sports model that has been the norm in American society thus far.

3.6 Where the Law is Going

Society is presently recognizing the concerns behind transgender individuals participating in women's sports. While courts have opened the avenue for transgender individuals to partake in women's sports, there is certainly the potential for pushback. Prior to *Bostock*, claims were filed asserting that the permission of transgender students to participate according to their stated gender identity discriminated against other student competitors. The argument asserted that inherent biological differences between the sexes might place other female participants at a competitive disadvantage when schools permit transgender females to compete on women's sports teams.[92] The discrimination, the argument states, is that biologically female athletes are disadvantaged because transgender female athletes retain male physiological characteristics that are likely to give them an unfair competitive advantage. Biological females thus are not afforded equal athletic opportunities.[93]

Understandably, there will always be disagreements in the legal realm regarding what rights individuals hold when those rights become part of a contentious discussion. As a presently contentious issue, the idea of women's sports and the inclusion of transgender individuals will take time for society to come to terms with. It will similarly take time for society to recognize the shift that appears to be occurring towards a more open mindset.

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[92] CONG. RSCH. SERV. LEGAL SIDEBAR, *supra* note 33.
[93] *Id.*

When it comes to professional sports, we may see a more precise application of *Bostock*'s new interpretation of Title VII regarding "sex" and the expansion of transgender womens' allowance in women's sports. In addition, the *Bostock* precedent may be used to apply to professional sports in the team's capacity as an employer. At present, the triumphs of transgender individuals at the school sports level may turn into triumphs at the professional level as these individuals grow up and potentially pursue professional careers.

3.7 Conclusion

As an issue that affects individuals of all ages—young children, high school students, college athletes, and even professional athletes—the opening of women's sports to transgender women participants will not be resolved quickly. Although *Bostock* has laid a firm groundwork upon which various courts can build, the change in the interpretation of the term "sex" may not be successful in all realms of the law. However, it seems as though the cases already mentioned provide a smooth path for the liberal interpretation of this issue. As seen within the topic of women's sports, America's judicial system is equating/applying Title VII's new definition of "sex" with Title IX's "sex." However, the law is rarely interpreted in a straight path. Society will inevitably have high levels of push and pull, and the courts will determine the best way to minimize the grey area surrounding this issue. Wins and losses on both sides of the debate will permeate the courts shortly. One thing is sure, however, that the door has been opened for transgender women to participate legally in women's sports, and it is not a door that will ever be closed again. Thus, the aftermath of *Bostock v. Clayton County* has had a significant impact in this area and is one that is prescribed continued growth.

3.8 References

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731

Jack Dutton, "Who Is Lia Thomas? Trans Swimmer Breaking College Records Sparks Debate," Newsweek, 8 December 2021, https://www.newsweek.com/trans-swimmer-breaking-college-records-sparks-debate-1657354

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Soule by Stanescu v. Connecticut Association of Schools, Inc, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021).

Cong. Rsch. Serv. Legal Sidebar, supra note 33.

4. UNDERSTANDING THE IMPLICATIONS

4.1 Summary

Whether the Supreme Court foresaw the far-reaching implications their decision in *Bostock*[94] would have on society, is a moot point. Their decision has changed the outcomes of Title VII cases and has also had a ripple effect on Title IX cases, as courts have been quick to cross-apply *Bostock*'s interpretation of "sex" to Title IX. Additionally, the decision to do so seems only to be gaining a stronger foothold. In 2021, the Federal Department of Education issued a notice/rule describing their determination that the interpretation of sex discrimination set out by the Supreme Court in *Bostock* will act as the proper guide for the Department's interpretation of discrimination "based on sex" under Title IX.[95] Ultimately, the Department has stated that their decisions will be guided by the note that Title IX prohibits discrimination based on sexual orientation and gender identity, just as Title VII does.

The legal definition of "sex" has been changed within the employment context. We also see that the court system has been quick to apply it to the educational context. This quick application is indicative of the path being paved for further application of *Bostock*'s expansive interpretation of "sex" to other areas of the law such as housing, employment by religious organizations, healthcare, freedom of speech, and constitutional claims.

[94] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).
[95] U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity, U.S. Department of Education, 16 June 2021, https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity

Concerning the cross-application of the definition of “sex” from Title VII to Title IX, the notion of judicial interpretation is present. The act of emphasis lay in the court’s application of a precedent from one statute to a wholly unrelated statute.

4.2 References

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).

5. CONCLUSION

Though this analysis limited itself to applying *Bostock*'s definition of "sex" to areas under Title IX's realm, it is not difficult to see from these two examples how *Bostock*'s new interpretation of "sex" is rapidly pervading the legal environment. The newfound definition of "sex" will impact and change the law regarding employment and education, but also healthcare, housing, the constitutional claims founded in the Equal Protection Clause, and even areas of religious exemption.

As discussed previously, the Supreme Court decided in *Bostock* that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[96] The way that the Court decided to frame this statement in their majority opinion positioned it to be widely interpreted. Their framing has dramatic implications and provides a critical tool for furthering the LGBTQ movement.

Whether courts utilize *Bostock* as a precedent (as with Title IX) to expand legislation's purview or whether Congress enacts new legislation to reflect the definitional change, one note is clear: the expanded definition of "sex" is here to stay. What remains to be seen is how quickly the legal system will formally adopt this new definition.

5.1 References

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).

[96] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).