SMALL GESTURES AND UNEXPECTED CONSEQUENCES: TEXTUALIST INTERPRETATIONS OF STATE ANTIDISCRIMINATION LAW AFTER *BOSTOCK V. CLAYTON COUNTY*

*Anastasia E. Lacina**

The U.S. Supreme Court's landmark decision in Bostock v. Clayton County *expanded Title VII's coverage of victims of sex discrimination in employment by interpreting the statute to also protect LGBTQ+ employees who were discriminated against because of their sexual orientation and/or gender identity. Although* Bostock *only applies precedentially to Title VII, the long and interwoven history of state antidiscrimination statutes shows that the ruling may reach beyond federal law.*

This Note examines state court cases that have considered whether to apply Bostock*'s reasoning to the interpretation of state antidiscrimination statutes. Furthermore, this Note argues in favor of a path forward in state courts for expanding LGBTQ+ legal protections. The textualist reasoning of* Bostock*'s opinion—whether perceived or actual—should be highly persuasive to state court jurists, especially those in conservative states, which are more likely to have textualist judges. Adopting* Bostock *at the state level has the potential to expand crucial legal rights and protections for millions of LGBTQ+ people.*

* J.D. Candidate, 2023, Fordham University School of Law; B.A., 2019, Fordham University. I would like to thank Professor Catherine Powell for her insight and guidance throughout the writing process. Additionally, thank you to Jocelyn Lee and the editors and staff of the *Fordham Law Review* for providing so much time, feedback, and encouragement. Finally, thank you to my wonderful family and friends, especially my mother, Natalie, and father, Charles—I could not have done this without your love and support.

INTRODUCTION

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them . . . . [T]he limits of the drafters' imagination supply no reason to ignore the law's demands.[1]

In 2018, Amanda Sims, an employee of Tarrant County in Fort Worth, Texas, came out as a lesbian to her supervisor of three years.[2] The story that followed is one that is familiar to many LGBTQ+ people. First, she began to receive explicitly hostile treatment from her supervisor.[3] Then, her employer unexpectedly audited her for improper spending, which revealed no impropriety.[4] After she reported suspected employment discrimination to a city commission on human relations, Sims was placed on administrative leave.[5] Finally, in July 2019, Sims was fired for what she alleged were pretextual reasons.[6] When Sims sued her employer in Texas state court, she

1. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).
2. Plaintiff's Original Petition and Request for Disclosure at 2, Sims v. Tarrant Cnty. Coll. Dist., No. DC-19-18217 (Tex. Dist. Feb. 21, 2020), 2019 WL 6117844.
3. *Id.* at 2–3 (noting that Sims's supervisor stated that "[she had] to overlook [her] bias when it [came] to [Sims]").
4. *Id.* at 3.
5. *Id.*
6. *Id.* at 2–3.

did not include a claim under the Texas Commission on Human Rights Act,[7] which bans discrimination because of sex but not sexual orientation.[8] Instead, she sued under the Texas state constitution.[9] But while the case was on appeal, the legal landscape drastically changed for Amanda Sims and for every LGBTQ+ employee in the United States.[10]

In June 2020, the U.S. Supreme Court ruled 6–3 in *Bostock v. Clayton County*[11] that federal law protected LGBTQ+ people from employment discrimination on the basis of their sexual orientation and gender identity.[12] Under Title VII of the Civil Rights Act of 1964,[13] covered employers are prohibited from discriminating against their employees "because of . . . sex."[14] Focusing almost solely on the text of Title VII,[15] Justice Gorsuch, writing for the majority, crafted a unique legal opinion, which held that Title VII's prohibition of sex discrimination also prohibited discrimination on the basis of sexual orientation and gender identity.[16]

In the time since *Bostock*, many courts at both the federal and state levels have grappled with the consequences of the decision.[17] *Bostock*'s interpretive holding only applies precedentially to Title VII, which regulates only certain types of employers and employees.[18] But state antidiscrimination laws can provide stronger protections by covering more employees and offering broader remedies to claimants.[19] Additionally, it was unclear whether *Bostock*'s reasoning could apply to nonemployment antidiscrimination statutes, on either the state or federal level.[20] Thus, claims like Amanda Sims's—which was brought under state antidiscrimination laws—were placed in legal limbo.[21] If the *Bostock* decision influences state courts' interpretations of state law, it could expand legal protections for

7. TEX. LAB. CODE ANN. §§ 21.051–21.061 (West 2021).

8. *See* Sims v. Tarrant Cnty. Coll. Dist., No. DC-19-18217, 2020 WL 9594341, at *2 (Tex. Dist. Feb. 21, 2020), *rev'd in part*, 621 S.W.3d 323 (Tex. App. 2021).

9. Plaintiff's Original Petition and Request for Disclosure, *supra* note 2, at 2.

10. *See Sims*, 621 S.W.3d at 328 (noting that four months after the Texas trial court entered its order, the U.S. Supreme Court issued its opinion in *Bostock*).

11. 140 S. Ct. 1731 (2020).

12. *Id.* at 1737.

13. 42 U.S.C. §§ 2000e to 2000e-17.

14. *Id.* § 2000e-2(a).

15. *See infra* notes 113–17 and accompanying text.

16. *Bostock*, 140 S. Ct. at 1737.

17. *See infra* Parts II.A–C. At least one circuit court has expanded *Bostock*'s ruling to apply to cases about Title IX and federally funded education. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("After the Supreme Court's recent decision in *Bostock* . . . we have little difficulty holding that a bathroom policy precluding [plaintiff] from using the boys restrooms discriminated against him 'on the basis of sex.'").

18. *See infra* notes 75–76, 79 and accompanying text.

19. *See infra* notes 75–80 and accompanying text.

20. Although state courts have addressed *Bostock*'s applicability to nonemployment antidiscrimination statutory provisions, *see infra* Parts II.B–C, this Note often uses state and federal employment law as representative of antidiscrimination law as a whole. Scholarship in this area is often focused on employment law. *See, e.g.*, sources cited *infra* notes 25, 32, 54.

21. *See, e.g.*, Supplemental Brief of Appellant at 5, Love v. Young, 320 So. 3d 259 (Fla. Dist. Ct. App. 2021) (No. 1D18-2844) (responding to the appellate court's order to submit a supplemental brief addressing the potential effects of *Bostock* on the case before it).

millions of LGBTQ+ people living in states without explicit statutory protections.[22]

Part I of this Note first situates *Bostock* in the history of antidiscrimination law in the United States, before examining the reasoning of the majority and dissenting opinions. Part II assesses how state courts have applied or not applied *Bostock* to state antidiscrimination statutes that are analogous to Title VII. Part III lays out arguments for both sides of the issue that state courts now face: whether to apply *Bostock*'s reasoning to their own state antidiscrimination laws. Finally, Part IV argues in favor of *Bostock*'s applicability to state antidiscrimination statutes.

I. ANTIDISCRIMINATION LAW: A PATCHWORK QUILT

The *Bostock* decision rests on decades of judicial precedent and statutory civil rights law,[23] and it cannot be fully understood without an examination of those historical developments. Part I.A discusses the history of federal antidiscrimination law, with a focus on the Civil Rights Act of 1964[24] ("1964 Act"). Part I.B examines state antidiscrimination laws, as well as the current state landscape for LGBTQ+ legal protections. Part I.C examines the *Bostock* opinion in depth and situates it within the current political and legal context.

A. A History of Federal Antidiscrimination Law

Statutory antidiscrimination law is a relatively recent phenomenon in the United States.[25] Despite the Civil War amendments[26] and Reconstruction laws[27] during the mid-nineteenth century, the modern statutory framework for federal antidiscrimination law began with the 1964 Act.[28] The 1964 Act and its amendments prohibit discrimination "because of" race, color, religion, national origin, and sex in federally funded education[29] (Title IX) and private employment[30] (Title VII). The 1964 Act also prohibits discrimination in public accommodations because of race, color, religion,

22. CHRISTY MALLORY ET AL., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 1–2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf [https://perma.cc/L8SM-TY3D].

23. *See infra* Part I.A; *see also* Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 598–99 (2021).

24. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28, 42, and 52 U.S.C.).

25. *See* Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477 (2006).

26. *See* U.S. CONST. amends. XIII, XIV, XV.

27. *See, e.g.*, Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended in scattered sections of the U.S.C.).

28. *See Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm [https://perma.cc/3BJ3-MKN2] (last visited Mar. 4, 2022).

29. 20 U.S.C. § 1681(a).

30. 42 U.S.C. § 2000e-2(a).

and national origin, but not sex (Title II).[31] Although a small number of states passed limited antidiscrimination statutes before the 1964 Act,[32] Congress was the driving force in the new field of statutory antidiscrimination law.[33]

Since the 1964 Act, Congress has passed a variety of additional antidiscrimination protections. For example, the Age Discrimination in Employment Act of 1967[34] expanded Title VII employment protections to age discrimination,[35] whereas the Americans with Disabilities Act of 1990[36] expanded both employment and public accommodation protections to people with disabilities.[37] As a result, antidiscrimination law on the federal level is somewhat fractured and scattered across a variety of statutory provisions.[38]

Sexual orientation and gender identity are not explicitly named protected characteristics under the 1964 Act or its amendments.[39] Congress has not yet passed any amendments or comprehensive statutes to protect LGBTQ+ people from discrimination.[40] Consequently, most progress on LGBTQ+ civil rights at the federal level has come from federal courts, especially the Supreme Court.[41] For example, in *Romer v. Evans*,[42] the Court struck down a discriminatory state constitutional amendment,[43] holding that the

31. *Id.* § 2000a(a).

32. *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 558 (2013) (noting that Massachusetts, New York, and Pennsylvania prohibited racial discrimination in employment before the federal government).

33. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 708 (1979) ("Since the Civil War, the Federal Government and the federal courts have been the '*primary* and powerful reliances' in protecting citizens against . . . discrimination." (quoting Steffel v. Thompson, 415 U.S. 452, 464 (1974))). In *Cannon*, the Supreme Court rejected the argument that the subject matter of Title IX—antidiscrimination in education—was an area of concern suited to the states. *Id.*

34. 29 U.S.C. §§ 621–634.

35. *Id.* § 623(a).

36. 42 U.S.C. §§ 12101–12213.

37. *Id.* §§ 12112(a), 12182(a).

38. *See* Sperino, *supra* note 32, at 546–47.

39. *See* MALLORY, *supra* note 22, at 4–5.

40. *See* Equality Act, H.R. 5, 117th Cong. §§ 3–7, 10 (as passed by House, Feb. 25, 2021) (preventing discrimination based on sex, sexual orientation, and gender identity in public accommodations, education, employment, and housing). The Equality Act has not yet been passed by the Senate. Karl Evers-Hillstrom, *Pride Month Concludes Without Equality Act Vote in Senate*, THE HILL (July 1, 2021, 8:11 AM), https://thehill.com/business-a-lobbying/561060-pride-month-concludes-without-equality-act-vote-in-senate [https://perma.cc/GEM9-XUHR].

41. *See* LAMBDA LEGAL, WHY FEDERAL COURTS MATTER TO THE LGBT COMMUNITY 1–2 (2012), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_why-federal-courts-matter-to-the-lgbt-community.pdf [https://perma.cc/S88M-YP5D]. The Supreme Court's LGBTQ+ jurisprudence has evolved and built upon itself over the past twenty-five years. *See* Romer v. Evans, 517 U.S. 620, 623 (1996); Lawrence v. Texas, 539 U.S. 558, 562, 578–79 (2003) (striking down anti-sodomy statutes as unconstitutional); United States v. Windsor, 570 U.S. 744, 749–52 (2013) (holding that same-sex spouses must be treated as spouses for purposes of federal law); Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (finding a constitutional right to same-sex marriage).

42. 517 U.S. 620 (1996).

43. This amendment prohibited all state and local governments from enacting legislation to protect LGBTQ+ Americans. *See id.* at 624 (citing COLO. CONST. art. II, § 30b (1992)).

amendment unconstitutionally singled out LGBTQ+ people and imposed a burden on them.[44] In doing so, the Court recognized a legal principle that LGBTQ+ people should be afforded the same basic rights as cis-heterosexual people.[45]

B. The Current State Law Landscape

Since the nation's founding, states have had the power to regulate sexual and marital relationships.[46] In 2003, Massachusetts became the first state to legalize same-sex marriage when the Massachusetts Supreme Judicial Court held that its state constitution guaranteed same-sex couples the right to marry.[47] In the years that followed, other states exhibited both backlash and progress: while at least ten states also legalized same-sex marriage, over thirty states passed laws or constitutional amendments prohibiting it.[48] After same-sex marriage was legalized nationwide,[49] LGBTQ+ activists shifted their focus to address other areas of law, such as conversion therapy,[50] transgender health-care coverage,[51] and antidiscrimination statutes.[52]

Currently, all fifty states, as well as the District of Columbia and Puerto Rico, have at least one sex discrimination statute on the books.[53] Forty-seven states prohibit private employment discrimination on the basis of sex,[54] forty-five states prohibit sex discrimination in public accommodations,[55] and forty-nine states prohibit sex discrimination in housing.[56] In contrast, only twenty-one states have full protections for LGBTQ+ people—based on sexual orientation *and* gender identity—in employment, public

---

44. *See id.* at 631–33.

45. *See* Spindelman, *supra* note 23, at 607–09.

46. *See Lawrence*, 539 U.S. at 568–69. Laws against sodomy and buggery existed during the eighteenth and nineteenth centuries but were rarely enforced in the United States. *Id.* In the 1970s, some states began to single out same-sex sodomy for prosecution, but most continued to only enforce sodomy statutes for public homosexual conduct. *See id.* at 570–71.

47. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

48. *See* Brandon Gee, *Remembering "Goodridge,"* MASS. LAWS. WKLY. (May 9, 2013), https://masslawyersweekly.com/2013/05/09/remembering-goodridge/ [https://perma.cc/P9P6-HBYM].

49. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

50. *See Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/Y4QA-4ZPL] (Feb. 15, 2022).

51. *See Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies/youth_medical_care_bans [https://perma.cc/PQL2-RLMH] (Feb. 15, 2022).

52. *See Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/ [https://perma.cc/S6MT-RGK6] (Feb. 15, 2022).

53. *See* Iris Hentze & Rebecca Tyus, *Sexual Harassment in the Workplace*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx [https://perma.cc/2LHF-PARB].

54. James M. Oleske, Jr., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 45 n.155 (2016) (all states but Alabama, Georgia, and Mississippi).

55. *Id.* (all states but Alabama, Georgia, Mississippi, North Carolina, and Texas).

56. *Id.* (all states but Wyoming).

accommodations, and housing.[57] This leaves a significant coverage gap: twenty-nine states do not have full statutory antidiscrimination protections for LGBTQ+ people.[58]

This disparity between state laws has major consequences: although state law is similar to federal law in many ways,[59] there are nevertheless important historical and legal differences between federal and state frameworks that can lead to different legal analyses and outcomes.[60] Unlike federal antidiscrimination law, which is scattered across many statutory provisions,[61] many states have omnibus antidiscrimination laws, which include all protected traits within one "statutory regime."[62] For example, New York's antidiscrimination statute is structured in a way that is standard for state antidiscrimination laws.[63] New York's main statutory provision[64] is divided into two relevant parts: Subsection (1) guarantees the right to be free from employment discrimination "because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability."[65] Subsection (2) guarantees the same rights, for the same protected characteristics, in education, public accommodations, and housing.[66] Whereas New York's main antidiscrimination statutory provision is contained within two subsections,[67] the equivalent federal statutory protections (where they exist) are scattered across at least eleven separate

57. *See LGBTQ Americans Aren't Fully Protected from Discrimination in 29 States*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/states/ [https://perma.cc/8W48-GBSM] (last visited Mar. 4, 2022). Of these twenty-nine states, Utah is unique in that it has some statutory protections for LGBTQ+ people in housing and employment but not in public accommodations. *Utah: LGBTQ Non-Discrimination in the States*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/category/ut/ [https://perma.cc/JD5D-86VR] (last visited Mar. 4, 2022).

58. *LGBTQ Americans Aren't Fully Protected from Discrimination in 29 States*, *supra* note 57. The twenty-nine states are as follows: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. *Id.* See Sperino, *supra* note 32, at 557 n.109, for a list of all fifty states' employment discrimination statutes.

59. *See infra* notes 83–86.

60. *See generally* Sperino, *supra* note 32.

61. *See supra* notes 35–38 and accompanying text.

62. Sperino, *supra* note 32, at 560. States also differ in how many traits they protect from discrimination. *Compare* N.Y. EXEC. LAW § 291(1) (McKinney 2021) (prohibiting discrimination based on "age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability"), *with* ARK. CODE ANN. § 16-123-107(a) (2021) (prohibiting discrimination based on "race, religion, national origin, gender, or . . . disability").

63. N.Y. EXEC. LAW §§ 290–301 (McKinney 2021). New York's antidiscrimination law is one of the strongest in the United States. *The New York State Human Rights Law: Your Rights*, RAPAPORT L., https://www.rapaportlaw.com/employment-law/the-new-york-state-human-rights-law-your-rights/ [https://perma.cc/PG48-2RZX] (last visited Mar. 4, 2022).

64. N.Y. EXEC. LAW § 291 (McKinney 2021).

65. *Id.* § 291(1).

66. *Id.* § 291(2).

67. The entirety of New York's antidiscrimination law is contained within sections 290–301. *See id.* §§ 290–301.

statutory provisions.[68] Although there are exceptions to this generalization,[69] state antidiscrimination laws are typically simpler and more self-contained than their federal counterparts.[70]

There are also important linguistic differences between federal and state antidiscrimination laws. For example, many state employment statutes do not mirror Title VII's two-part structure, which distinguishes between disparate treatment and disparate impact claims.[71] As discussed, state statutes are often simpler in language and structure than their scattered federal counterparts.[72] State statutes may also employ slightly different causality language: for instance, "on the grounds of" instead of "because of,"[73] or "gender" instead of "sex."[74]

State antidiscrimination laws can also be more friendly to plaintiffs and claimants than federal law.[75] To use employment law as an example, Title VII generally only applies to employers with more than fifteen employees who have worked there for at least twenty weeks.[76] In comparison, many states' employment statutes apply to much more of the workforce.[77] For instance, New York's employment discrimination statute applies to every employer in the state.[78] In addition, damages for successful plaintiffs under Title VII are capped at $50,000 for small businesses and $300,000 for the largest corporations.[79] Many states, in contrast, provide uncapped

68. *See* 20 U.S.C. § 1681(a) (sex in education); 29 U.S.C. § 623(a) (age in employment); 38 U.S.C. § 4311(a) (military status in employment); 42 U.S.C. § 2000a(a) (race, color, religion, and national origin in public accommodations); *id.* § 2000d (race, color, and national origin in education); *id.* § 2000e-2(a) (race, color, religion, national origin, and sex in employment); *id.* § 3604 (race, color, national origin, religion, sex, familial status, and disability in housing); *id.* § 12112(a) (disability in employment); *id.* §§ 12131–12132 (disability in education); *id.* § 12182(a) (disability in public accommodations).

69. *See* Sperino, *supra* note 32, at 560–61 n.114 (listing omnibus state antidiscrimination statutes and identifying states that have scattered statutory regimes).

70. *See id.* at 546.

71. *See* 42 U.S.C. § 2000e-2(a); *see also* Sperino, *supra* note 32, at 562–63.

72. *See supra* notes 61–70 and accompanying text.

73. *See, e.g.*, FLA. STAT. § 760.08 (2021).

74. *See, e.g.*, MICH. COMP. LAWS § 750.147b(1) (2022).

75. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 155–57 (2009).

76. 42 U.S.C. § 2000e(b); *see also Coverage of Business/Private Employers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/coverage-businessprivate-employers [https://perma.cc/2SG4-CCBY] (last visited Mar. 4, 2022). The main exception is that age discrimination claimants must work for an employer with at least twenty employees. 29 U.S.C. § 630(b).

77. *See* Daniel Lewallen, Note, *Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes*, 47 IND. L. REV. 817, 821–22 (2014) (noting that twenty states have lowered the number of employees for employment discrimination coverage, while fourteen states have employment discrimination laws which cover all employers in the state).

78. N.Y. EXEC. LAW § 292(5) (McKinney 2021). Beyond the statutory definition of "employer," New York courts typically consider four factors: (1) selection and engagement of the employee, (2) the payment of a salary or wages, (3) power over dismissal, and (4) power to control the employee's conduct. Popat v. Levy, 253 F. Supp. 3d 527, 541 (W.D.N.Y. 2017).

79. 42 U.S.C. § 1981a(b)(3); *see* Drummonds, *supra* note 75, at 156.

compensatory damages—as well as punitive damages—for employment discrimination.[80] The opportunity for unlimited damages may incentivize claimants to sue under their state antidiscrimination laws.[81] In addition, if a claimant's employer is not covered by Title VII—for example, if the employer does not have more than fifteen employees—a claimant may have no choice but to sue under state law to obtain relief.[82]

Despite the many substantive and procedural differences between federal and state antidiscrimination laws, state courts have traditionally interpreted their own statutes in line with analogous federal law.[83] Some state legislatures have even included directives in the statutory text or legislative history for the statute to be interpreted in line with federal law.[84] In addition, despite particular linguistic differences between federal and state law,[85] antidiscrimination statutes have a similar structure: often, the area of targeted discrimination (employment, public accommodations, etc.) is followed by a causality clause (for example, "discrimination *because of*") and a list of protected characteristics.[86]

Other state courts have chosen to interpret their state statutes consistently with federal law for public policy reasons such as uniformity and federal deference.[87] Reputational concerns by state judges may also predominate in a decision: "[A] state judge, despite having the inherent authority to construe a state statute in a manner inconsistent with federal law, may hesitate to announce to the world that a majority of the country's highest court got the issue wrong."[88] Despite linguistic and structural differences between state and federal laws, there are incentives for state judges to interpret state law to be consistent with federal law.

C. Bostock v. Clayton County

For many years after Title VII's enactment, federal courts had interpreted the provision to not protect LGBTQ+ people based on sexual orientation or

80. *See* Drummonds, *supra* note 75, at 156. For example, New York allows uncapped compensatory damages and punitive damages up to $10,000, as well as civil penalties and injunctive relief for the claimant. N.Y. EXEC. LAW § 297(4)(c) (McKinney 2021).

81. *See, e.g.*, Kenton H. Steele & Melvin J. Davis, *Application of Caps on Non-Economic Damages in State and Federal Employment Claims*, REMINGER (Feb. 2019), https://www.reminger.com/publication-771 [https://perma.cc/B3DJ-HN5D].

82. *See Discrimination Claims—State Laws*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/minimum [https://perma.cc/P2XJ-GYZA] (last visited Mar. 4, 2022); *see also* MALLORY, *supra* note 22, at 8.

83. *See* Long, *supra* note 25, at 476–77 ("[S]tate courts have routinely adopted the federal courts' interpretations of parallel federal law with little or no independent analysis of the applicable state statute.").

84. *See id*. at 477 n.32 (citing IND. CODE ANN. § 22-9-5-27 (West 2004)).

85. *See supra* notes 71–74 and accompanying text.

86. See *supra* notes 63–66 and accompanying text for a discussion of New York's antidiscrimination law as a typical example of a state antidiscrimination statute.

87. *See* Long, *supra* note 25, at 478–79; *see also infra* Part III.A.3. Among other things, uniformity between federal and state courts on antidiscrimination law may reduce forum shopping. *See* Long, *supra* note 25, at 478.

88. Long, *supra* note 25, at 479.

gender identity.[89] However, the Supreme Court had never addressed the issue.[90] In 2013, Gerald Bostock—a longtime child welfare advocate for Clayton County, Georgia—joined a gay recreational softball league.[91] Shortly after, he was fired from his job for "unbecoming" conduct.[92] In a similar case, Donald Zarda was fired as a skydiving instructor in New York days after he mentioned he was gay.[93] Aimee Stephens, a transgender woman, presented as male when she was hired to work at a Michigan funeral home.[94] Six years later, she informed her employer that she was transgender and would be transitioning.[95] Shortly afterward, she was fired.[96] All of these plaintiffs sued for employment discrimination under Title VII, claiming that they had been discriminated against because of their sex.[97] In 2020, their appeals were combined and heard by the Supreme Court in *Bostock v. Clayton County*.[98]

In *Bostock*, the Supreme Court ruled 6–3 that Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity.[99] Writing for the majority, Justice Gorsuch used well-known tools of statutory interpretation[100] to analyze the relevant provision of Title VII:

> It shall be an unlawful employment practice for an employer . . . 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.[101]

The Court construed "because of" to refer to a traditional but-for causation test: "If the employer intentionally relies in part on an individual employee's

89. See Bostock v. Clayton County, 140 S. Ct. 1731, 1777–78 (2020) (Alito, J., dissenting), for a list of circuit courts that addressed the issue of sexual orientation or gender identity discrimination under Title VII. The Seventh Circuit was the first federal appellate court to reconsider the question and hold that discrimination based on sexual orientation was covered by Title VII. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 340–41 (7th Cir. 2017).

90. *See Hively*, 853 F.3d at 340.

91. *Bostock*, 140 S. Ct. at 1737.

92. *Id.* at 1737–38.

93. *Id.* at 1738. Zarda sued under both Title VII and New York's state antidiscrimination law, but because a jury found in favor of his employer on the state law claim, Zarda was left to argue only the Title VII claim on appeal. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 109–10 (2d Cir. 2018) (en banc), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

94. *Bostock*, 140 S. Ct. at 1738.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1737–38.

99. *See id.* at 1736–37.

100. *See id.* at 1738 (discussing the "ordinary public meaning" of the statute); Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 307–08 (2017) (discussing the Supreme Court's use of different methods of statutory interpretation).

101. 42 U.S.C. § 2000e-2(a) (emphasis added).

sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[102]

Justice Gorsuch laid out several hypotheticals of employees being fired because of their sexual orientation and gender identity:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, 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 he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.[103]

The same principle applied for transgender employees: if an employer has two otherwise identical women—one assigned female at birth and one assigned male at birth—and fires the employee assigned male at birth, then the employer intentionally discriminated against that employee because of her sex.[104]

For the Court, sexual orientation and gender identity are "inextricably bound up with sex."[105] Thus, sex does not have to be the primary or sole reason for discrimination but just one of many but-for causes.[106] The Court pointed to several Title VII precedents to support this reasoning.[107] For example, the Court pointed to *Phillips v. Martin Marietta Corp.*,[108] in which the Court had ruled that an employer who rejected female applicants with young children, but accepted male applicants with young children, violated Title VII's prohibition against sex discrimination.[109] Although the employer may have based its decision primarily on a separate criterion—the presence of young children—the employee's sex was nevertheless a but-for cause of the discriminatory conduct.[110] By analogy, even if a discriminatory employer is motivated by the sex to which the employee is attracted, it does not erase the fact that the employer also discriminated because of the employee's sex.[111]

---

102. *Bostock*, 140 S. Ct. at 1741. The Court noted that both parties disputed whether the term "sex" in Title VII referred solely to biological characteristics (the employers' view) or whether it also included gender roles and norms (the employees' view). *Id.* at 1739. However, since "nothing in [its] approach to these cases turn[ed] on the outcome of the parties' debate," the Court assumed a purely biological definition of sex. *Id.*

103. *Id.* at 1741.

104. *Id.*

105. *Id.* at 1742. However, the Court also acknowledged that "homosexuality and transgender status are distinct concepts from sex." *Id.* at 1746–47.

106. *Id.* at 1743.

107. *See id.* at 1743–44.

108. 400 U.S. 542 (1971) (per curiam).

109. *See Bostock*, 140 S. Ct. at 1743 (citing *Phillips*, 400 U.S. 542).

110. *Id.*

111. *Id.* at 1742 ("To be sure, [the] employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

The *Bostock* Court stated that it was only concerned with the law "as it is"[112] and rejected the employers' arguments, which relied on the legislative history of Title VII.[113] The Court rejected the argument that congressional intent should inform how courts interpret Title VII, stating that Congress's failure to amend Title VII to explicitly include sexual orientation and gender identity is irrelevant.[114] The Court's opinion in *Bostock* is primarily interested in the statutory text of Title VII—specifically the meanings of "because of" and "sex"—and not the intentions or motivations of the legislators who drafted it.[115]

The Court characterized its own opinion in *Bostock* as textualist.[116] In the years since *Bostock*, legal scholars, political pundits, and the public have understood *Bostock* as a textualist opinion.[117] However, Justice Alito in dissent argued that the majority's appeal to textualism was erroneous[118] and that the majority went beyond the bounds of Title VII by not using the definition of "sex" at the time of Title VII's adoption.[119]

Both the majority and dissent anticipated that *Bostock* may be used in ways that go beyond Title VII and employment discrimination. The majority disregarded the employers' claim that the decision would "sweep beyond Title VII to other federal or state laws," saying that "none of these other laws are before us . . . today."[120] Justice Alito, in his dissent, also identified over

112. *Id.* at 1745.

113. *See id.* at 1749 ("Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy.").

114. *Id.* at 1747.

115. *See id.* at 1749. To support its textualist roots, the Court cited Justice Antonin Scalia's writings on statutory interpretation. *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

116. *See id.* at 1749 ("[W]hen the meaning of the statute's terms is plain, our job is at an end.").

117. *See* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (describing *Bostock*'s reasoning as a type of "formalistic textualism," which focuses on "semantic context" and downplays "policy concerns or the practical (even monumental) consequences of the case"); George T. Conway III, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision/ [https://perma.cc/3SEV-H4H3] (arguing that *Bostock* is a "victory" for textualism); Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/GZ47-WT6E] (arguing that *Bostock*'s "progressive textualism" is crucial for the future of civil rights law). *But see* Spindelman, *supra* note 23, at 561 (discussing how *Bostock* may "self-present[] as a textualist statutory interpretation ruling," but "[d]espite *Bostock*'s painstaking care . . . the Supreme Court's pro-LGBT rights jurisprudence figures in the opinion in important ways").

118. *See Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated . . . ."). Justice Kavanaugh, writing separately in dissent, called the majority opinion's reasoning "literalist" rather than "textualist." *See id.* at 1824 (Kavanaugh, J., dissenting).

119. *Id.* at 1755 (Alito, J., dissenting).

120. *Id.* at 1753 (majority opinion).

one hundred federal statutes[121] that prohibit sex discrimination, as well as other civil rights statutes—both federal and state—that mirror Title VII.[122] In the aftermath of *Bostock*, some federal courts have applied *Bostock*'s reasoning to Title IX, a parallel section of the 1964 Act that bans sex discrimination in education.[123] Some organizations also anticipated that *Bostock* would have an effect on other statutes, including state antidiscrimination laws.[124]

II. STATE COURT EXPANSION OF *BOSTOCK*

State courts are bound by *Bostock*'s interpretation of Title VII, just as federal courts are.[125] However, despite early speculation,[126] it was unclear whether states would defer to the Supreme Court and choose to apply *Bostock*'s reasoning to areas of state law[127]—and if so, whether they would limit *Bostock*'s application to employment law. Almost two years since *Bostock*, several states with statutory provisions against sex discrimination—but not against sexual orientation or gender identity discrimination—have encountered the issue of how to apply *Bostock*'s reasoning to state law.[128] State courts have encountered the issue not only in employment discrimination cases but also in public accommodation and ethnic-intimidation cases.[129]

---

121. *Id.* at 1791–96 (Alito, J., dissenting).

122. *Id.* at 1778.

123. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("After the Supreme Court's recent decision in *Bostock* . . . we have little difficulty holding that a bathroom policy precluding [plaintiff] from using the boys restrooms discriminated against him 'on the basis of sex.'"); B.P.J. v. W. Va. State Bd. of Educ., No. 21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021) ("[The school] could not exclude B.P.J. [the transgender plaintiff] from a girls' athletic team without referencing her 'biological sex' . . . . Her sex 'remains a but-for cause' of her exclusion under the law." (quoting *Grimm*, 972 F.3d at 616)). *But see* Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299, 1320 (11th Cir. 2021) (declining to reach the transgender plaintiff's Title IX claim), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

124. *See generally* MALLORY, *supra* note 22 (studying state antidiscrimination laws and estimating the number of LGBTQ+ people who could gain protections if those laws were interpreted consistently with *Bostock*); Cathryn Oakley, *What the Supreme Court Ruling in Bostock Means for State Legislative Efforts*, HUM. RTS. CAMPAIGN (July 15, 2020), https://www.hrc.org/news/what-the-supreme-court-ruling-in-bostock-means-for-state-legislative-effort [https://perma.cc/9FX8-LEUZ] (surveying areas of state law that could be affected by *Bostock*).

125. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby* . . . ." (emphasis added)); Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912) ("When Congress . . . adopt[s an] act, it sp[eaks] for all the people and all the States . . . . That policy is as much the policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.").

126. *See, e.g.*, *supra* note 124 and accompanying text (identifying organizations that predicted *Bostock*'s effect on state law).

127. *See* MALLORY, *supra* note 22, at 4–6.

128. *See infra* Parts II.A–C.

129. *See infra* Parts II.A–C (discussing these cases).

This part examines the implications of *Bostock* on the state level. Specifically, it surveys the five state cases that have addressed the issue of whether *Bostock*'s reasoning should apply to state antidiscrimination statutes. Part II.A addresses two employment discrimination cases from Texas and Ohio. Part II.B discusses two public accommodations cases from Florida and Michigan. Finally, Part II.C considers one case involving an ethnic-intimidation criminal statute from Michigan.

A. Employment Discrimination Cases

Texas was one of the first states to address *Bostock*'s applicability in a state law context. Texas's state antidiscrimination statute—the Texas Commission on Human Rights Act[130] (TCHRA)—provides, in part, that "[a]n employer commits an unlawful employment practice if *because of* . . . *sex* . . . the employer . . . discriminates . . . against an individual [in the terms of employment]."[131] The TCHRA explicitly states that the purpose of the law is, inter alia, to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964."[132]

In February 2020, Amanda Sims sued her employer under the Texas state constitution for firing her because of her sexual orientation.[133] She did not make a claim under the TCHRA, which both parties agreed did not prohibit sexual orientation discrimination.[134] But while her case was on appeal, the U.S. Supreme Court decided *Bostock*.[135] Eventually, in *Tarrant County College District v. Sims*,[136] the Court of Appeals for the Fifth Circuit of Texas at Dallas held that the TCHRA's prohibition against sex discrimination also prohibited discrimination based on sexual orientation and gender identity, "[i]n light of *Bostock*."[137] The court reasoned that since no Texas state court had weighed in on the issue of whether the TCHRA covered LGBTQ+ discrimination, it would look to analogous federal law for guidance.[138] The court noted that both Title VII and the TCHRA prohibited employment discrimination "because of . . . sex."[139] After analyzing *Bostock*'s reasoning,[140] the court concluded that it "*must* follow *Bostock*" in order to "reconcile and conform the TCHRA with federal anti-discrimination"

130. TEX. LAB. CODE ANN. §§ 21.051–21.061 (West 2021).
131. *Id.* § 21.051 (emphasis added).
132. *Id.* § 21.001(1).
133. *See supra* notes 2–9 and accompanying text.
134. *See* Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 326 (Tex. App. 2021).
135. *See id.* at 328.
136. 621 S.W.3d 323 (Tex. App. 2021).
137. *Id.* at 329.
138. *See id.* at 328.
139. *See id.* (alteration in original).
140. The court specifically quoted an excerpt from *Bostock* emphasizing the importance of the text of Title VII: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Id.* at 329 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020)).

laws.[141] In reaching the conclusion that it "must" conform with *Bostock*, the court emphasized the purpose of the TCHRA—to "coordinate and conform" with federal antidiscrimination laws—and precedent from the Texas Supreme Court, which had looked to federal courts for guidance when the TCHRA and Title VII had similar language.[142]

In another case, an Ohio state court recognized, in dicta, the potential applicability of *Bostock* to Ohio state law.[143] Ohio's antidiscrimination statute has language almost identical to both Texas's law and Title VII: Ohio also prohibits discrimination in employment "because of . . . sex."[144] In *Nance v. Lima Auto Mall, Inc.*,[145] the Court of Appeals for the Third Appellate District of Ohio upheld a trial court's dismissal of a claim under Ohio's antidiscrimination statute for lack of facts to sustain a claim.[146] However, in dicta, the court addressed the applicability of *Bostock* to Ohio's antidiscrimination law.[147] Citing Ohio case law asserting that federal antidiscrimination law is generally applicable when interpreting Ohio state antidiscrimination law,[148] the court stated that a claim of sexual orientation discrimination in Ohio "could potentially have a basis in law under Bostock."[149]

B. Public Accommodations Cases

Although *Bostock* itself is limited to employment discrimination under Title VII, some courts—both state and federal—have applied *Bostock*'s reasoning to other areas of antidiscrimination law with similar statutory schemes.[150] One of these areas is discrimination in public accommodations, which is regulated on the federal level by Title II of the 1964 Act.[151]

The Florida Civil Rights Act of 1992[152] (FCRA) prohibits, in part, discrimination in places of public accommodation "on the ground of . . . sex."[153] In *Love v. Young*,[154] the First District Court of Appeal of Florida declined to address the issue of whether the FCRA also prohibits

141. *Id.* (emphasis added).
142. *See id.* at 328.
143. Nance v. Lima Auto Mall, Inc., No. 1-19-54, 2020 WL 3412268, at *26 (Ohio Ct. App. June 22, 2020).
144. OHIO REV. CODE ANN. § 4112.02(A) (West 2021).
145. No. 1-19-54, 2020 WL 3412268 (Ohio Ct. App. June 22, 2020).
146. *See id.* at *26.
147. *See id.*
148. *Id.* at *25.
149. *Id.* at *26.
150. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (applying *Bostock* to a transgender student's Title IX claim for discrimination in public school bathrooms because of his gender identity); Rouch World, LLC v. Mich. Dep't of C.R., No. 20-000145-MZ, slip op. at 7 (Mich. Ct. Cl. Dec. 7, 2020) (applying *Bostock* to a state public accommodations statute), *appeal granted*, 961 N.W.2d 153 (Mich. 2021) (mem.).
151. 42 U.S.C. § 2000a(a).
152. FLA. STAT. §§ 760.01–760.11 (2021).
153. *Id.* § 760.08.
154. 320 So. 3d 259 (Fla. Dist. Ct. App. 2021).

discrimination based on gender identity.[155] In a divided plurality opinion,[156] the court rejected the plaintiff's claim that a club discriminated against her in violation of the FCRA when performers of a male exotic dancer club refused to dance for her because she was transgender.[157] Both the trial and appellate courts held that even if the FCRA prohibited gender identity discrimination, the club's defense of the performers' "right to be protected from unwanted sexual touching" trumped the plaintiff's claim under the FCRA.[158]

Dissenting from the plurality opinion, Judge Ross L. Bilbrey argued in favor of *Bostock*'s applicability to the FCRA, even in public accommodations cases.[159] Judge Bilbrey cited opinions from the Florida Commission on Human Relations[160] (FCHR), the purpose of the FCRA,[161] and Florida case law[162] to show that applying *Bostock* to the FCRA was consistent with Florida law.[163] Although the plurality dismissed the dissent's reasoning as dicta,[164] Judge Bilbrey also noted that because of the fractured nature of the panel's plurality opinion, *Love* establishes no binding precedent in Florida.[165]

In Michigan, the Elliot-Larsen Civil Rights Act[166] (ELCRA) forbids the denial of the "full and equal enjoyment of . . . public service because of . . . sex."[167] Like in Title VII, "sex" is not defined in the ELCRA, so Michigan courts have interpreted its meaning over the past forty years.[168] In *Barbour v. Department of Social Services*[169]—a pre-*Bostock* case—a Michigan appellate court held that sexual orientation does not fall under the definition

155. *Id.* at 260. Although the appellate court asked the parties to submit supplemental briefs on the effect of *Bostock* on the case, the plurality did not address *Bostock* directly in its opinion. *Id.* at 260 n.1.

156. In a panel of three judges, Judge Susan L. Kelsey wrote the plurality, Judge Lori S. Rowe concurred in result only, and Judge Ross L. Bilbrey dissented. *See id.* at 259.

157. *See id.* at 260–61. Management asked the plaintiff to move to another seat in the same section after the performers were told that there was a "man dressed as a woman" in the audience. *Id.* at 261.

158. *See id.* at 262–63.

159. *Id.* at 271–74 (Bilbrey, J., dissenting).

160. *See id.* at 272 n.15 (noting that the FCHR recently promulgated a policy stating that gender identity and sexual orientation are covered under the FCRA but that that policy receives "no deference" from Florida courts).

161. *See id.* at 272 (noting that the FCRA does not differentiate between "sex" and "gender").

162. *See id.* at 273 ("The Florida Civil Rights Act is patterned after Title VII, and therefore federal case law regarding Title VII is applicable." (quoting Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n.3 (Fla. Dist. Ct. App. 2002))).

163. *Id.* at 271–74.

164. *See id.* at 272 n.13.

165. *Id.* at 274–75 (Bilbrey, J., concurring).

166. MICH. COMP. LAWS §§ 37.2101–37.2804 (2022).

167. *Id.* § 37.2302(a).

168. *See* Rouch World, LLC v. Mich. Dep't of C.R., No. 20-000145-MZ, slip op. at 3 (Mich. Ct. Cl. Dec. 7, 2020), *appeal granted*, 961 N.W.2d 153 (Mich. 2021) (mem.).

169. 497 N.W.2d 216 (Mich. Ct. App. 1993), *appeal denied*, 570 N.W.2d 655 (Mich. 1997).

of "sex" in the ELCRA.[170] However, *Barbour* did not address whether gender identity is included under "sex."[171]

Since *Bostock*, two Michigan courts have considered whether sex discrimination includes gender identity discrimination.[172] In *Rouch World, LLC v. Michigan Department of Civil Rights*,[173] the court assessed whether the Michigan Department of Civil Rights's Interpretive Statement 2018-1, which construed the ELCRA's prohibition against sex discrimination to include both sexual orientation and gender identity,[174] was valid under Michigan law.[175] Under *Barbour*, the court concluded that its interpretation regarding sexual orientation was invalid, although it left open the possibility that *Barbour* was "no longer valid" in light of *Bostock*.[176] The *Rouch World* court also concluded, however, that gender identity discrimination was properly included under the ELCRA.[177] In reaching that conclusion, the court noted that the Michigan Supreme Court—in remanding a related case, *People v. Rogers*[178]—had ordered the lower court to reconsider their decision in light of *Bostock*.[179] Thus, because of the Michigan Supreme Court's directive in *Rogers*, the *Rouch World* court followed *Bostock*'s reasoning in its own case and held that gender identity discrimination was included under the ELCRA.[180] After the trial court's decision in *Rouch World*, the Michigan Department of Civil Rights appealed directly to the Michigan Supreme Court on the issue of whether the ELCRA applied to discrimination based on sexual orientation—essentially asking the court to overturn *Barbour*.[181] The Michigan Supreme Court agreed to hear the appeal.[182]

---

170. *Id.* at 217–18.

171. *Rouch World*, slip op. at 4.

172. The first case addressed public accommodations under the ELCRA. *See Rouch World*, slip op. at 2–3. The second line of cases interpreted an ethnic-intimidation criminal statute that prohibited crimes motivated by animus based on "gender." *See infra* Part II.C.

173. No. 20-000145-MZ (Mich. Ct. Cl. Dec. 7, 2020), *appeal granted*, 961 N.W.2d 153 (Mich. 2021) (mem.).

174. Mich. C.R. Comm'n, The Meaning of "Sex" in the Elliott-Larsen Civil Rights Act (Act 453 of 1976) (May 21, 2018), https://www.michigan.gov/-/media/Project/Websites/mdcr/mcrc/interpretive-statements/2018/meaning-of-sex.pdf [https://perma.cc/8PU5-HXDF].

175. *Rouch World*, slip op. at 2–3.

176. *Id.* at 4. The *Rouch World* court concluded that it must follow *Barbour* until a higher Michigan court overturns it, even if they "believe that it was wrongly decided or has become obsolete." *See id.* (quoting *In re* AGD, 933 N.W.2d 751, 755 (Mich. Ct. App. 2019)).

177. *Id.* at 7.

178. 951 N.W.2d 50 (Mich. Ct. App. 2020), *vacated*, 950 N.W.2d 48 (Mich. 2020) (mem.).

179. *Rouch World*, slip op. at 5 ("[T]he [Michigan] Supreme Court's order directing that Court to reconsider its decision in light of *Bostock* sheds at least some light on whether this Court should consider *Bostock* when interpreting the ELCRA."). See *infra* Part II.C for a discussion of the *Rogers* case.

180. *See Rouch World*, slip op. at 5–7.

181. *See* Rouch World, LLC v. Mich. Dep't of C.R., 961 N.W.2d 153, 153 (Mich. 2021) (mem.).

182. *Id.* Oral argument for the appeal was held on March 2, 2022. *See Schedule of Oral Arguments—March 2022 Session*, MICH. SUP. CT., https://www.courts.michigan.gov/49059f/siteassets/case-documents/calendarcall/2022_03_schedule.pdf [https://perma.cc/7C2R-57KL] (last visited Mar. 4, 2022).

C. Ethnic-Intimidation Cases

Before *Rouch World*, another Michigan court weighed in on *Bostock*'s applicability to state law for an ethnic-intimidation statute that prohibited intimidation or harassment of another person because of, inter alia, their "gender."[183] In *Rogers*, the defendant allegedly harassed a transgender woman because of her gender identity and threatened her with a gun.[184] The defendant was charged under an ethnic-intimidation statute,[185] which prohibited crimes motivated by animus "because of . . . gender."[186] Both the Michigan trial court and intermediate appellate court[187] originally held that the statute did not include crimes motivated by animus against transgender people,[188] but on appeal, the Michigan Supreme Court vacated and remanded the case for reconsideration in light of *Bostock*.[189] On remand, the appellate court reversed, interpreting the ethnic-intimidation statute in line with *Bostock*.[190]

Although the Michigan appellate court interpreted "gender" to include transgender status, it also specified that *Bostock* "does not control the outcome of this case," although it should be afforded "respectful consideration."[191] Ultimately, the court interpreted "gender" as synonymous with "sex" as the term was used at the time of enactment.[192] Thus, the defendant's alleged conduct was covered by the statute because "were it not for the complainant's biological sex (male), defendant would not have harassed and intimidated her."[193]

III. TO APPLY OR NOT TO APPLY: THE DEBATE IN STATE COURTS

In the aftermath of *Bostock*, state courts have employed the decision's reasoning to analogous state antidiscrimination laws to varying degrees. In

183. MICH. COMP. LAWS § 750.147b(1) (2022).

184. 951 N.W.2d 50, 53 (Mich. Ct. App. 2020), *vacated*, 950 N.W.2d 48 (Mich. 2020) (mem.).

185. *See id.* at 54–55.

186. MICH. COMP. LAWS § 750.147b(1) (2022).

187. Although the intermediate appellate court disagreed with the trial court's reasoning, it ultimately reached the same result. *See Rogers*, 951 N.W.2d at 53.

188. *See id.*

189. People v. Rogers, 950 N.W.2d 48, 48 (Mich. 2020) (mem.).

190. People v. Rogers, No. 346348, 2021 WL 3435544, at *1 (Mich. Ct. App. Aug. 5, 2021).

191. *Id.* at *6. Furthermore, the court noted:

> [Federal] precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis.

Id. at *5 (quoting Garg v. Macomb Cnty. Cmty. Mental Health Servs., 696 N.W.2d 646, 658 (Mich. 2005)).

192. *See id.* at *6 ("We acknowledge that gender and sex are not now defined as synonymous, although, as discussed, they were defined as such in 1988.").

193. *Id.* The appellate court also noted that if one substituted "sex" for "gender" in the statute, the language would be similar to that of Title VII. *Id.*

doing so, these courts have grappled with issues of statutory interpretation, principles of federalism, and public policy.[194] This part discusses the main justifications for and against applying *Bostock* to state antidiscrimination laws. Some arguments are primarily derived from scholarly commentary about state antidiscrimination law in general,[195] whereas others come from *Bostock*'s majority and dissenting opinions.

A. Bostock *Is Applicable to State Statutes*

Three state courts that have addressed the issue of *Bostock*'s applicability have concluded that state antidiscrimination statutes should be interpreted in line with federal law.[196] This section addresses three main reasons—articulated by both scholars and state courts—for why federal and state antidiscrimination law should be consistent in this area. Part III.A.1 examines the intentions of state legislatures. Part III.A.2 discusses the persuasiveness of the textualist roots of *Bostock*. Finally, Part III.A.3 addresses reasons of public policy, including uniformity in the law.

1. The Intentions of State Legislatures

The intent of a legislature, especially when explicitly stated in the statutory text, has often been considered persuasive for courts interpreting that statute.[197] Although some states passed antidiscrimination statutes before the 1964 Act,[198] the concept of antidiscrimination laws—particularly ones that address sex-based discrimination—was a relatively new phenomenon in the 1960s.[199] After federal antidiscrimination statutes were passed, similar statutes flooded the states.[200] State statutes that explicitly require "forced consistency" with federal law are relatively rare.[201] However, the historical link and dialogue between federal and state antidiscrimination law can be a strong indicator of state legislative intent.[202] The 1964 Act and the state statutes that preceded it follow a common federalist trend: "Sometimes,

194. *See infra* Parts III.A–B.

195. Because much of the scholarship in this area is focused on employment law, this part will frequently use employment law as representative of antidiscrimination law in general. *See supra* note 20.

196. *See supra* Part II (discussing *Tarrant County*, *Rouch World*, and *Rogers*).

197. *See* 73 AM. JUR. 2D *Statutes* § 60 (2012) ("The cardinal rule of statutory construction is to effectuate legislative intent . . . ."); *see also id.* § 71 ("To determine the legislature's intent . . . the court may properly consider not just the statute's language but also the purpose and necessity for the law.").

198. *See supra* note 32.

199. *See* Long, *supra* note 25.

200. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 91 (2002).

201. Long, *supra* note 25.

202. *See* Sperino, *supra* note 32, at 586 ("In many instances, there are strong textual and historical ties regarding provisions of state and federal law where similar treatment would be appropriate."); *see also* Goldfarb, *supra* note 200, at 88–89 (arguing that redundancy between federal and state antidiscrimination laws is not only inevitable but also desirable in a federalist system).

federal civil rights legislation fills a vacuum left by state legislative inaction, and states then follow suit by enacting their own versions of the federal statute."[203] Many states have acknowledged this historic link between federal and state antidiscrimination law, either legislatively or judicially.[204] Currently, fourteen states do not have full statutory protections for LGBTQ+ people but do have statutes with identical key language to Title VII;[205] of those fourteen states, eleven have some sort of "signal" from the state legislature or judicial precedent that state courts should look to federal law for guidance.[206]

As a case in point, in *Tarrant County*, the Texas appellate court relied on an explicit purpose statutory provision, stating that the statute was intended to execute the policies of Title VII.[207] With no precedent from other Texas courts on the issue, the *Tarrant County* court therefore looked to federal law, with *Bostock* being directly on point.[208] Similarly, although it did not reach the issue in its holding, the Ohio court in *Nance* acknowledged long-standing Ohio case law, stating that federal antidiscrimination laws are usually relevant when interpreting Ohio state antidiscrimination laws.[209] Thus, it is important for state courts to look to legislative intent when interpreting state

203. Goldfarb, *supra* note 200, at 90.

204. *See infra* note 206 and accompanying text.

205. For these purposes, "identical language" means that the state statute includes the key interpretive language that the *Bostock* Court relied on: "because of," "sex," and "discrimination." The fourteen states are as follows: Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming. *See* ARIZ. REV. STAT. ANN. § 41-1463 (2021); GA. CODE ANN. § 45-19-29 (2021); IDAHO CODE ANN. § 67-5909 (West 2021); KAN. STAT. ANN. § 44-1009 (West 2021); KY. REV. STAT. ANN. § 344.040(1)(a) (West 2021); LA. STAT. ANN. § 23:332 (2021); NEB. REV. STAT. § 48-1104 (2021); N.D. CENT. CODE § 14-02.4-03(1) (2021); OKLA. STAT. ANN. tit. 25, § 1302 (West 2021); 43 PA. STAT. AND CONS. STAT. § 955(a) (West 2022); S.C. CODE ANN. § 1-13-80(A) (2022); S.D. CODIFIED LAWS § 20-13-10 (2021); TENN. CODE ANN. § 4-21-401(a) (2021); WYO. STAT. ANN. § 27-9-105(a)(i) (2021).

206. This may take either the form of an explicit purpose provision in the statute or a declaration from a high-level state court. *See supra* notes 132, 148–49, 179, 187–90 and accompanying text. The eleven states are as follows: Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Nebraska, Pennsylvania, South Carolina, South Dakota, and Tennessee. *See* IDAHO CODE ANN. § 67-5901(1) (West 2021) (identifying the execution of the 1964 Act as the general purpose of the statute); KY. REV. STAT. ANN. § 344.020(1)(a) (West 2021) (same); S.C. CODE ANN. § 1-13-100 (2021) (limiting the application of the statute to persons covered by federal antidiscrimination law); Davis v. Sheraton Soc'y Hill Hotel, 907 F. Supp. 896, 899 n.1 (E.D. Pa. 1995) (applying state employment antidiscrimination law in accordance with Title VII); Higdon v. Evergreen Int'l Airlines, Inc., 673 P.2d 907, 909–10 n.3 (Ariz. 1983) (finding Title VII case law to be persuasive in interpreting state law); Ga. Dep't of Hum. Res. v. Montgomery, 284 S.E.2d 263, 265 (Ga. 1981) (same); McCabe v. Johnson Cnty., Bd. of Cnty. Comm'rs, 615 P.2d 780, 783 (Kan. Ct. App. 1980) (same); Motton v. Lockheed Martin Corp., 900 So.2d 901, 909 (La. Ct. App. 2005) (looking to federal precedent to interpret state antidiscrimination laws); Father Flanagan's Boys' Home v. Agnew, 590 N.W.2d 688, 693 (Neb. 1999) (same); Huck v. McCain Foods, 479 N.W.2d 167, 169 (S.D. 1991) (noting that the state law is "comparable" to Title VII); Campbell v. Fla. Steel Corp., 919 S.W.2d 26, 31 (Tenn. 1996) (applying the same analysis under both state and federal antidiscrimination law).

207. *See supra* notes 132, 139, 142 and accompanying text.

208. *See supra* note 138 and accompanying text.

209. *See supra* notes 145–49 and accompanying text.

laws; in many cases, the legislature's intent was to explicitly link state law with the analogous federal act.[210]

2. Textualism and Strengthening the Link Between Title VII and Similarly Worded Statutes

Textualism—the judicial theory of primarily or solely analyzing the text to interpret a statute—has become the core of modern statutory interpretation.[211] Justice Kagan once famously said, "[W]e're all textualists now."[212] Textualism purports to offer a "politically neutral" method of statutory interpretation by focusing only on the text of the statute.[213] However, textualism continues to be associated with a conservative judicial ideology typically espoused by conservative judges.[214]

The self-proclaimed textualist nature of *Bostock*'s reasoning may be compelling for state courts, especially in more conservative states. In the majority opinion, Justice Gorsuch focused almost solely on the text of Title VII,[215] as well as Title VII case law.[216] Almost the entire analysis rested on four words in the statute: "because of," "sex," and "discrimination."[217] Technically, Justice Gorsuch's reasoning in *Bostock* could apply to any analogous statute with identical language.[218] There was very little in the opinion that was specific to Title VII itself or to Title VII federal case law.[219] Consequently, *Bostock* may be particularly relevant and applicable to state statutes with wording identical to Title VII.

For example, Texas's, Ohio's, and Michigan's statutes have identical language when it comes to those four words.[220] The *Tarrant County* court specifically identified the similarity between Title VII and the Texas antidiscrimination statute as a reason for applying *Bostock*.[221] The *Rouch World* court in Michigan also identified Title VII as a provision "analogous"

---

210. *See supra* note 206 and accompanying text.

211. *See* O'Scannlain, *supra* note 100, at 306.

212. *See id.* at 304.

213. *See* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013) (reviewing SCALIA & GARNER, *supra* note 115).

214. *See id.* *But see* Grove, *supra* note 117, at 270 (arguing that "formalistic textualism," as seen in *Bostock*, may constrain judges' political leanings and enhance judicial legitimacy).

215. *See supra* notes 113–17 and accompanying text.

216. *See supra* notes 107–11 and accompanying text.

217. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739–41 (2020); Spindelman, *supra* note 23, at 563–66.

218. *See supra* notes 100–04, 113–17 and accompanying text (discussing the Court's textualist analysis of Title VII and its rejection of extratextualist sources like legislative history).

219. *See* Spindelman, *supra* note 23, at 566 (noting how *Bostock* wraps up its reasoning without departing too meaningfully from Title VII's text). *But see id.* at 564 ("[J]udicial precedent is doing meaningful work at *Bostock*'s ostensibly textualist foundations.").

220. *See supra* notes 131, 144, 167 and accompanying text. Florida's statute has slightly different language: "on the ground of . . . sex." *See supra* note 153 and accompanying text.

221. Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 328 (Tex. App. 2021).

to their state antidiscrimination law.[222] Furthermore, of the twenty-nine states that do not have full statutory protections for LGBTQ+ people,[223] fourteen states have employment discrimination statutes with key language identical to Title VII.[224]

3. Uniformity and Certainty as Compelling Legal Interests

Public policy arguments for uniformity and federal deference may also play a role in state courts' decision-making.[225] Some scholars maintain that reputational concerns for state judges argue in favor of deferring to federal courts, even when interpreting state law.[226] In addition, state courts have often stated that uniformity in antidiscrimination law—on both the federal and state levels—is a compelling reason to defer to federal law.[227] Not only can uniformity reduce uncertainty for potential plaintiffs and defendants,[228] but it also eases the burden on state and federal judges, who are often interpreting state law concurrently.[229] With their much larger caseload,[230] it is far easier for state courts to look to federal precedent for guidance than to interpret state law completely independently.[231] Furthermore, there is also a sense that civil rights, in particular, is an area of the law where states should follow the federal government's lead,[232] especially given the history of U.S. civil rights law[233]: "If a right is fundamental to our national conception of justice, it must not disappear or diminish as one crosses state lines."[234]

As an example of this concern for uniformity, in *Rouch World*, the Michigan court implied that inconsistency in Michigan public accommodations law was detrimental to the state.[235] Under *Barbour*—the pre-*Bostock* state precedent—"sex" does not include sexual orientation in

222. Rouch World, LLC v. Mich. Dep't of C.R., No. 20-000145-MZ, slip op. at 4–5 (Mich. Ct. Cl. Dec. 7, 2020), *appeal granted*, 961 N.W.2d 153 (Mich. 2021) (mem.).

223. *See supra* note 58.

224. *See supra* note 205 (listing these statutes).

225. *See supra* notes 87–88 and accompanying text.

226. *See supra* note 88 and accompanying text.

227. *See, e.g.*, Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465, 478 (N.J. 1978) ("[W]here [federal antidiscrimination standards] are useful and fair, it is in the best interests of everyone concerned to have some uniformity in the law."); Winn v. Trans World Airlines, Inc., 484 A.2d 392, 404 (Pa. 1984) (noting that the Pennsylvania antidiscrimination statute should be construed with federal law in mind because of "the interest [in] . . . uniformity and predictability"); W. Va. Univ. v. Decker, 447 S.E.2d 259, 265 (W. Va. 1994) (stating that uniformity in antidiscrimination law is "valuable *per se*").

228. *Cf.* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1099–100 (1989) (discussing the benefits and disadvantages of federal-state uniformity in § 1983 actions).

229. *See* Sperino, *supra* note 32, at 587; *see also* Long, *supra* note 25, at 479 (noting that employment discrimination cases are much more common in federal court than in state court).

230. Long, *supra* note 25, at 479.

231. *See* Sperino, *supra* note 32, at 586–87.

232. *See* Goldfarb, *supra* note 200, at 143–46.

233. *See supra* Part I.A and note 33.

234. Goldfarb, *supra* note 200, at 143.

235. *See supra* notes 173–82 and accompanying text.

Michigan's antidiscrimination statute.[236] But the *Rouch World* court interpreted the same provision to include gender identity.[237] Thus, Michigan currently treats sexual orientation and gender identity differently, even though they are included under the same statutory definition ("sex"). With *Barbour*'s reasoning based on decades-old statutory interpretation and *Rouch World*'s reasoning based on analogous federal law, there is now doubt in Michigan as to how LGBTQ+ people are treated under the ELCRA.[238] In light of this, the *Rouch World* court cast doubt on the validity of the *Barbour* precedent after *Bostock*.[239]

B. Bostock *Is Irrelevant to State Law*

Alternatively, some argue that *Bostock*'s reasoning is inapplicable when interpreting state antidiscrimination laws. One of the primary arguments in favor of this position is the federalist principle of state independence from the federal government.[240] In addition, some courts may not find the textualist reasoning of *Bostock* compelling.[241] Part III.B.1 addresses the argument that states should independently interpret their own statutes in accordance with federalist principles. Part III.B.2 discusses the flaws in *Bostock*'s textualism and addresses how these flaws could make the decision's reasoning less compelling to state courts.

1. Federalism and the Independence of the States

Federalism is the concept of separation of powers between the federal government and state governments.[242] With some exceptions,[243] state legislatures and courts are the ultimate determiners of state law.[244] Although a sense of deference to federal law among state judges is strong,[245] the sense of independence from federal courts is probably equally as strong.[246]

---

236. *See supra* notes 169–71 and accompanying text.

237. *See supra* note 177 and accompanying text.

238. *See supra* notes 176–80 and accompanying text.

239. *See supra* notes 176–80 and accompanying text.

240. *See* People v. Rogers, No. 346348, 2021 WL 3435544, at *6 (Mich. Ct. App. Aug. 5, 2021) ("[T]he federal interpretation of an analogous federal statute would not control our interpretation of a Michigan statute, even under the most expansive reading of the U.S. Constitution's supremacy clause."). *See generally* Kevin J. Koai, Note, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763 (2019) (arguing that state courts should interpret employment discrimination law independently from federal courts).

241. *See generally* Spindelman, *supra* note 23.

242. Goldfarb, *supra* note 200, at 59.

243. For instance, if a state law "defines" a federal statutory or constitutional right, then federal courts may have the ability to interpret that state law. *See* Bush v. Gore, 531 U.S. 98, 105–06 (2000) (overturning the Florida Supreme Court's interpretation of the Florida state constitution).

244. *See* Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (noting that state courts are the "ultimate expositors of state law").

245. *See supra* notes 87–88 and accompanying text.

246. *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1063 (2003) (arguing

Proponents of federalism argue, among other things, that state independence "encourage[s] a dialogue" between federal and state courts about antidiscrimination law.[247] New innovations in civil rights law have often emerged as a result of a "back-and-forth" between Congress and the states.[248] Justice Louis Brandeis once famously noted: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[249] The metaphor of states as democratic laboratories has persisted for almost one hundred years[250] and has provided more support for political and legal innovation through state independence.[251]

Independent state analyses of state statutes may also "reflect[] the unique and shared values within an individual state."[252] Individual states have their own histories, ideologies, cultures, and areas of social and economic expertise, which affect their approaches to political problems.[253] As long as these state laws do not violate the U.S. Constitution or federal law,[254] proponents of federalism argue that state legislatures and courts should be allowed to legislate and interpret as they wish.[255]

In *Love v. Young*, the plurality made no explicit mention of *Bostock* in its denial of the plaintiff's claim, despite the court's request for the parties to submit briefs on the case's applicability.[256] The omission of *Bostock* from the opinion—despite the heavy reliance on the case by the dissent[257] and the

---

that some state courts seem to only diverge from federal interpretations to "fight the outcome dictated by federal law"); *see also* Long, *supra* note 25, at 480–81 (discussing the "new judicial federalism" of the 1970s, in which state courts interpreted state constitutions to provide more protections than the U.S. Constitution).

247. Long, *supra* note 25, at 480; *see also* Gardner, *supra* note 246, at 1008–09 (discussing the historical overlap of federal and state governments in exercising political power).

248. *See* Goldfarb, *supra* note 200, at 87.

249. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

250. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting)).

251. *See* Goldfarb, *supra* note 200, at 97–98.

252. Long, *supra* note 25, at 480.

253. *See, e.g.*, *Lopez*, 514 U.S. at 581–83 (Kennedy, J., concurring) (discussing how different states may approach a political problem "where the best solution is far from clear"). *But see generally* Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that the Civil War and Reconstruction amendments fundamentally changed the balance of power between the federal government and the states, making antebellum federalist principles anachronistic).

254. *See* United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery . . . .").

255. *See, e.g.*, New York v. United States, 505 U.S. 144, 181–82 (1992).

256. 320 So. 3d 259, 260 n.1 (Fla. Dist. Ct. App. 2021).

257. *See supra* notes 159–63 and accompanying text.

parties in their briefs[258]—can be viewed as an implicit rejection of *Bostock*'s applicability to the Florida antidiscrimination statute.

In *People v. Rogers*, the Michigan appellate court initially rejected the usefulness of *Bostock* and federal law in general when interpreting Michigan state law.[259] Although the appellate court reversed on remand to be consistent with *Bostock*,[260] the court clarified that federal precedent could not rewrite Michigan law.[261] They were bound by precedent from the Michigan Supreme Court, and in analyzing Michigan law, they determined that *Bostock* "[did] not control the outcome of th[e] case."[262]

The power of states to enact and interpret their own laws, independent of federal law, is an important characteristic of American democracy.[263] It is partially due to this independence—as well as the efforts of LGBTQ+ activists—that same-sex marriage was legalized first throughout the states and then nationwide.[264] State sovereignty is a basic tenet of the dynamic between the national government, states, and their citizens.[265] For this reason, the federalist argument may be compelling to state judges interpreting state antidiscrimination laws.

2. The Flawed Textualism of *Bostock*

Some scholars also argue that *Bostock*'s reasoning is not as textualist as the majority claimed.[266] For instance, Professor Marc Spindelman posits that extratextual federal precedent on Title VII played a significant role in *Bostock*'s reasoning,[267] making it potentially inapplicable to other statutes.[268] Although *Bostock*'s logic may justify the possibility of interpreting Title VII to include anti-LGBTQ+ discrimination, some critics argue that it does not adequately justify its interpretive choice that Title VII

258. *See generally* Supplemental Brief of Appellant, Love v. Young, 320 So. 3d 259 (Fla. Dist. Ct. App. 2021) (No. 1D18-2844).

259. *See supra* notes 184–93 and accompanying text.

260. *See supra* notes 192–93 and accompanying text.

261. People v. Rogers, No. 346348, 2021 WL 3435544, at *6 (Mich. Ct. App. Aug. 5, 2021).

262. *Id.*

263. *See* Goldfarb, *supra* note 200, at 58–61.

264. *See supra* notes 46–48 and accompanying text; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

265. *See* New York v. United States, 505 U.S. 144, 181–82 (1992).

266. *See, e.g.*, Spindelman, *supra* note 23, at 556–57 ("*Bostock* is, in a way, the straightforward textualist statutory interpretation decision it claims to be—but it is also not that."); Eric Segall, *A Different View About Chief Justice Roberts and this Year's Term: The Return of O'Connorism*, DORF ON L. (July 17, 2020), http://www.dorfonlaw.org/2020/07/a-different-view-about-chief-justice.html [https://perma.cc/P9BN-N5HU] (questioning the textualist basis for *Bostock* and instead framing the decision as a debate between "values").

267. *See* Spindelman, *supra* note 23, at 571 (discussing how the *Bostock* majority invokes federal precedent about sex discrimination based on motherhood and sexual harassment as support for their decision).

268. *See* People v. Rogers, No. 346348, 2021 WL 3435544, at *6 (Mich. Ct. App. Aug. 5, 2021) (noting the differences between Title VII and the Michigan statute at issue).

must be interpreted that way.[269] Instead, *Bostock* implicitly relied on several extratextual sources, including federal Title VII case law and the Supreme Court's constitutional law jurisprudence on LGBTQ+ issues.[270]

For instance, the *Bostock* Court cited to several other Title VII cases that held that sexual harassment and discrimination based on motherhood both violate Title VII.[271] These precedents are not binding on state antidiscrimination laws, and may not even be persuasive, since some state laws have separate statutory provisions forbidding sexual harassment and discrimination based on parenthood.[272]

In addition, Professor Spindelman argues that the *Bostock* Court was heavily influenced by the Supreme Court's line of constitutional law cases on LGBTQ+ issues,[273] from *Romer* to *Obergefell v. Hodges*.[274] In interpreting Title VII, he argues, the *Bostock* Court "affirms that principles of constitutional justice, as they have developed, remain principles of legal justice, too."[275] The *Bostock* Court extracted the constitutional principle of LGBTQ+ equality under the law—evident from its own precedents over the past forty years—and applied it to a federal statute.[276] These constitutional norms and principles are binding on states, but they cannot be explicitly found in a textualist approach to interpreting Title VII. Thus, state courts interpreting similarly worded state statutes may find *Bostock*'s reasoning to be unpersuasive because of these extratextual factors at play in the decision.

IV. A PATH FORWARD FOR STATE COURTS AFTER *BOSTOCK*

As time passes, more state courts will begin to grapple with the issue of *Bostock*'s applicability to their own antidiscrimination statutes.[277] These state courts will be faced with differing statutes, with diverse histories and varying judicial precedent. Despite these distinctions, however, *Bostock* offers a powerful basis for state courts to expand protections for LGBTQ+ Americans beyond what federal law may provide.

This part argues that state courts should apply *Bostock*'s reasoning when interpreting state antidiscrimination statutes, which would extend significant protections for LGBTQ+ Americans. Part IV.A argues that *Bostock*'s reasoning should be compelling to state judges specifically because of its textualist identity. Part IV.B rebuts the contention that principles of

269. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting) ("The Court attempts to prove . . . not merely that the terms of Title VII *can* be interpreted that way, but that they *cannot reasonably be interpreted any other way*."); Spindelman, *supra* note 23, at 568.

270. *See* Spindelman, *supra* note 23, at 570–85.

271. *Bostock*, 140 S. Ct. at 1747.

272. *See, e.g.*, N.Y. EXEC. LAW § 296(1)(a) (McKinney 2021) (banning employment discrimination based on familial status).

273. *See* Spindelman, *supra* note 23, at 586–612.

274. 135 S. Ct. 2584 (2015).

275. Spindelman, *supra* note 23, at 608.

276. *See id.* at 608–09.

277. In the nearly two years since *Bostock* was handed down, at least five state courts have confronted the issue. *See supra* Part II.

federalism should outweigh *Bostock*'s influence on state courts. Finally, Part IV.C acknowledges the limitations of using *Bostock* as a basis for sexual orientation and gender identity antidiscrimination law, but nevertheless concludes that the practical benefits of expanding LGBTQ+ rights far outweigh the disadvantages.

A. The Persuasiveness of Bostock *in the Age of Textualism*

Many states, because of legal history and legislative intent, have antidiscrimination statutes with wording very similar, if not identical, to their federal counterparts.[278] The common textual differences between federal and state statutes—mainly the "omnibus" structure of state law compared to scattered federal laws,[279] as well as the number of characteristics protected[280]—are irrelevant to the core of *Bostock*'s textualist reasoning. In examining the text of Title VII, the *Bostock* Court's analysis focused almost solely on the framework of four words: "because of," "sex," and "discrimination."[281] Although *Bostock* is admittedly influenced by statutory and constitutional precedent,[282] the binary logic of the decision remains: if an employer has two otherwise identical employees—one male and one female, who are both married to men—and the employer fires the male employee—but not the female employee—because of his sexual orientation, then that employer has technically discriminated against the male employee *because of* that employee's sex.[283] This reasoning would apply to any statute with the phrase "because of . . . sex."[284] It may be formalistic, literalist, or even "wooden,"[285] but for judges in an age of textualism, it is nevertheless compelling,[286] especially since many state statutes have similar, if not identical, language.[287]

State courts that (1) are interpreting statutes with key language identical to Title VII[288] and that (2) have some signal from the state legislature or a higher court about using federal law for guidance[289] should especially adopt *Bostock* as a gloss on their own antidiscrimination statutes. In these states, the

278. *See supra* notes 85–86 and accompanying text.
279. *See supra* notes 61–62 and accompanying text.
280. *See supra* note 65 and accompanying text.
281. *See supra* note 217 and accompanying text.
282. *See supra* notes 271–76 and accompanying text.
283. *See supra* notes 103–11 and accompanying text.
284. *See supra* note 122 and accompanying text.
285. Spindelman, *supra* note 23, at 567; *see also* Grove, *supra* note 117, at 269–70 (arguing that "formalistic textualism" may be so limiting that it constrains judicial discretion, and thus, enhances judicial legitimacy).
286. *See, e.g.*, Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 329 (Tex. App. 2021) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law . . . ." (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020))).
287. *See supra* note 220 and accompanying text.
288. See *supra* note 205 and accompanying text for the list of states with statutes that have key language identical to Title VII.
289. See *supra* note 206 and accompanying text for the list of states with these "signals" to interpret state statutes in line with federal law.

textualist argument is the most compelling,[290] and the statutes should be prime targets for a *Bostock*-type argument, which has succeeded in Texas[291] and which seems primed to succeed in Michigan.[292]

In addition, the political background of *Bostock*'s 6–3 decision—specifically its authorship by Justice Gorsuch—should be compelling to conservative state judges. Despite Justice Alito's objections in his dissent,[293] *Bostock* not only presents itself as a textualist opinion[294] but also has been largely depicted as such in political and legal discourse.[295] Justice Gorsuch has been characterized, either positively or negatively, as Justice Antonin Scalia's textualist successor on an already conservative Supreme Court.[296] His authorship of a decision that was a significant victory for progressive LGBTQ+ activists[297] should be compelling in and of itself to state courts, especially courts in states without explicit LGBTQ+ antidiscrimination protections, which tend to be more conservative.[298] Conservative state courts may be hesitant to interpret a statute to include antidiscrimination protections for LGBTQ+ people,[299] especially with such vigorous dissents from other conservative textualists like Justice Alito.[300] But ultimately, these dissents fall flat by invoking traditionally anti-textualist methods of statutory interpretation, such as historical congressional intent.[301] On the other hand, *Bostock* successfully assuages textualist fears by repeatedly stating that a court should only be concerned with the law as it is.[302] By using a conservative tool of statutory interpretation to produce a progressive and

290. *See, e.g.*, *supra* notes 130–49, 173–80 and accompanying text (discussing the success of *Bostock*-type arguments in Texas and Michigan).

291. *See supra* notes 136–37 and accompanying text.

292. *See supra* notes 181–82 and accompanying text.

293. *See supra* note 118 and accompanying text.

294. *See supra* note 116 and accompanying text.

295. *See supra* note 117 and accompanying text.

296. *See* Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/7UUJ-895Z].

297. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1837 (2020) (Kavanaugh, J., dissenting) ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

298. See *supra* note 58 for the complete list of states that do not have full statutory antidiscrimination protections for LGBTQ+ people.

299. *See* Love v. Young, 320 So. 3d 259, 260 (Fla. Dist. Ct. App. 2021) ("The trial court did not decide whether the FCRA extends to gender identity, but rather applied an 'even-if' analysis . . . ." (footnote omitted)); *see also* Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 328–29 (Tex. App. 2021) (quoting *Bostock*'s textualist reasoning and acknowledgement that its holding would be unexpected to the drafters of the 1964 Act).

300. *See supra* notes 118–19 and accompanying text.

301. *See Bostock*, 140 S. Ct. at 1767–74 (Alito, J., dissenting); Conway, *supra* note 117 (discussing how *Bostock*'s majority lives up to textualist ideals, while its dissenting opinions "[come] up short" by invoking the "social context in which a statute was enacted"); Grove, *supra* note 117, at 294–95 (discussing the subjectivity of the dissenting justices' analyses when compared to the majority's analysis).

302. *See supra* notes 113–15 and accompanying text.

liberal outcome, Justice Gorsuch has "given permission" to textualist state judges to interpret their states' antidiscrimination statutes similarly,[303] even if those state legislatures are more conservative.[304]

B. Federalist Principles Should Not Limit States' Abilities to Adopt Federal Law

Proponents of federalism argue that states' interpretations of state laws should be independent from federal law to preserve the historic sovereignty of the states,[305] encourage innovation in the law,[306] and reflect political differences between different states.[307] But these arguments are inapplicable to the current political climate, as well as the issue of LGBTQ+ discrimination.

First and foremost, explicit statutory text—as well as the historical and linguistic links between state and federal antidiscrimination statutes—often demonstrates a legislative intent to mirror Title VII.[308] Examining legislative intent, whether derived through the text of the statute or through legislative history, is an accepted method of statutory interpretation.[309] Because many state antidiscrimination statutes were passed pursuant to the 1964 Act, the statutes are intentionally worded very similarly.[310] Some state legislatures, like Texas's, included an explicit directive to interpret their state statutes in line with federal law.[311] Now that *Bostock* has expanded the coverage of Title VII, state courts with statutory provisions like Texas's should interpret their statutes in line with the decision. In fact, it would be disregarding the will of the state legislature not to do so.

In addition, state courts following *Bostock* as a matter of statutory interpretation do not violate federalist doctrines such as the anti-commandeering principle.[312] The anti-commandeering principle forbids the federal government from "commandeering" state governments and actors to impose federal law.[313] However, the anti-commandeering principle does not normally apply to state courts because the U.S. Constitution specifically requires state courts to enforce federal law.[314]

303. For example, two state courts that have explicitly adopted *Bostock*'s reasoning quoted explicitly textualist excerpts from *Bostock*. *See Tarrant County*, 621 S.W.3d at 329 (quoting an excerpt from *Bostock* focusing on textualist interpretation); Rouch World, LLC v. Mich. Dep't of C.R., No. 20-000145-MZ, slip op. at 6 (Mich. Ct. Cl. Dec. 7, 2020) (discussing *Bostock*'s textualist logic), *appeal granted*, 961 N.W.2d 153 (Mich. 2021) (mem.).

304. *See infra* notes 346–47 and accompanying text.

305. *See supra* notes 263–65 and accompanying text.

306. *See supra* notes 247–51 and accompanying text.

307. *See supra* notes 252–55 and accompanying text.

308. *See supra* notes 202–04 and accompanying text.

309. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1776 (2020) (Alito, J., dissenting).

310. *See supra* note 86 and accompanying text.

311. *See supra* note 142 and accompanying text.

312. *See* New York v. United States, 505 U.S. 144, 161 (1992) (explaining the anti-commandeering principle).

313. *See* Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163–64 (2001).

314. *See* U.S. CONST. art. VI, cl. 2.

Furthermore, *Bostock* does not command state courts to interpret state statutory uses of "sex" to include sexual orientation and gender identity, nor is there any precedential effect.[315] State courts are free to disagree, as the Florida court in *Love* did.[316]

Furthermore, while it is true that the adoption of *Bostock*'s reasoning by state courts may not produce a "dialogue" between federal and state governments on LGBTQ+ antidiscrimination law,[317] this lack of dialogue would not stifle innovation among the states. With the current gridlock in Congress, the proposed federal Equality Act[318]—which would, among other things, codify *Bostock*'s holding in statutory federal law—is not close to becoming law.[319] Any federal statutory protections for LGBTQ+ people are probably far in the future. With Congress silent on this issue, the primary battleground for LGBTQ+ civil rights will continue to be in federal[320] and state courts,[321] as well as in state and local legislatures,[322] just as the same-sex marriage movement played out.[323] Achieving uniformity between federal and state antidiscrimination laws by adopting *Bostock* in state courts is a crucial step toward legal equality,[324] and it does not erase the dialogue between the states regarding the details of antidiscrimination laws, such as remedies and procedural mechanisms.[325] State antidiscrimination statutes have meaningful differences in how they address and remedy discrimination claims,[326] and these differences can continue to foster an innovative dialogue about antidiscrimination law among the states.[327]

C. An Imperfect Solution: Founding LGBTQ+ Legal Equality in Preexisting Frameworks

Finally, the value of consistency and securing universal legal protections for LGBTQ+ people supports the expansive application of *Bostock*.[328] Between federal and state civil rights law, LGBTQ+ people have inconsistent

315. There is, of course, precedential effect on state courts adjudicating Title VII claims.

316. *See supra* notes 153–58 and accompanying text.

317. *See supra* notes 247–51 and accompanying text.

318. H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021).

319. *See* Danielle Kurtzleben, *House Passes the Equality Act: Here's What It Would Do*, NPR (Feb. 24, 2021, 5:00 AM), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do [https://perma.cc/88KJ-W6CE].

320. *See* LAMBDA LEGAL, *supra* note 41, at 1–2, 4.

321. *See State Courts and the Rights of LGBT People and People Living with HIV*, LAMBDA LEGAL, https://www.lambdalegal.org/node/42671 [https://perma.cc/K2SH-VWKD] (last visited Mar. 4, 2022).

322. *See* Matt Lavietes, *As States Pursue a Wave of Anti-LGBTQ Laws, Cities Move in the Opposite Direction*, NBC NEWS (Nov. 18, 2021, 9:20 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/states-pursue-wave-anti-lgbtq-laws-cities-move-direction-rcna5890 [https://perma.cc/W57W-8KRS].

323. *See supra* notes 46–48 and accompanying text.

324. *See supra* Part III.A.3.

325. *See supra* notes 75–82 and accompanying text.

326. *See supra* notes 75–82 and accompanying text.

327. *See* Drummonds, *supra* note 75, at 156 (describing state innovations in the remedial field as "pioneering" and "leading-edge").

328. *See infra* notes 329–33 and accompanying text.

and unpredictable legal protections.[329] For instance, in a state without LGBTQ+ employment protections, large employers like Walmart or Amazon are forbidden from discriminating based on sexual orientation or gender identity because of *Bostock*'s gloss on Title VII,[330] yet a small bakery with four to five employees can fire people for being LGBTQ+. This leaves LGBTQ+ employees with uncertainty in the law and doubt as to whether their employers can discriminate against them.[331] Reducing uncertainty in civil rights law is particularly important because it eases the burden on minorities and other vulnerable groups[332] who may already believe that they are protected from employment discrimination in *all* instances because of *Bostock*.[333] Furthermore, now that all same-sex couples have the constitutional right to marriage, antidiscrimination protections are particularly important for LGBTQ+ people to resolve the "post-*Obergefell* paradox"[334]—mainly that "a gay person could be legally married in any of the fifty states on Saturday and fired from her job because of that marriage on Monday."[335]

The benefits of expanding *Bostock* to state antidiscrimination statutes are significant.[336] There are an estimated 3.6 million LGBTQ+ adults who would gain further employment protections under state law expansions.[337] And an estimated 4.3 million LGBTQ+ people over the age of thirteen would gain protections in public accommodations.[338] *Bostock* is admittedly an imperfect opinion: its legal reasoning can feel "wooden" and overly literalist.[339] Furthermore, some feminist scholars have criticized *Bostock* for failing to reckon with more inclusive legal theories, such as sex stereotyping,[340] and for focusing more on textualist statutory interpretation

329. *See* MALLORY, *supra* note 22, at 4–5; *see, e.g.*, *supra* notes 235–38 and accompanying text (discussing the uncertainty created by conflicting interpretations of the ELCRA in Michigan).

330. *See supra* note 76 and accompanying text.

331. *See generally* KERITH J. CONRON & SHOSHANA K. GOLDBERG, LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf [https://perma.cc/LF8P-UQNZ] (surveying the fractured nature of state protections for LGBTQ+ people).

332. *See supra* note 228 and accompanying text; *cf.* Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 63–64 (1994) (discussing the conflict between statewide uniformity and the fragmented application of civil rights in light of a discriminatory argument for statewide uniformity).

333. *See* Lewallen, *supra* note 77, at 817–18 (discussing how Title VII's minimum employee threshold creates uncertainty for victims of employment discrimination).

334. Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, CONN. L. REV. ONLINE, Dec. 2020, at 1, 6.

335. *See id.* (quoting Danielle D. Weatherby, *Commentary:* Hively v. Ivy Tech Community College, *in* FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS 301, 302 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020)).

336. MALLORY, *supra* note 22, at 1–2.

337. *Id.* at 1.

338. *Id.* at 2.

339. *See supra* note 285 and accompanying text.

340. *See* McGinley et al., *supra* note 334, at 11–13. The authors argue that *Bostock* fails in ignoring how discrimination against LGBTQ+ people is "highly gendered" because

than on principles of legal equality for LGBTQ+ people.[341] But the effects of *Bostock* are undeniable: not only did the decision expand employment protections for approximately eight million working LGBTQ+ adults,[342] but it also has the potential to expand legal protections to millions more LGBTQ+ people.[343] Moreover, Justice Gorsuch's utilization of "formalistic textualism"[344] may pave the way for further progress in antidiscrimination law by way of textualist legal arguments.[345]

Expanding antidiscrimination protections for LGBTQ+ people is a crucial objective in the fight for legal and constitutional justice.[346] A record number of conservative state legislatures have enacted, or have attempted to enact, anti-LGBTQ+ legislation in the past several years, in areas such as health care, education, and public accommodation.[347] This includes states with courts that have chosen to apply *Bostock* to state antidiscrimination laws, such as Texas and Michigan.[348] These legislatures are probably not receptive

---

LGBTQ+ people are often seen as violating traditional gender norms. *Id.* at 13. Furthermore, they argue that a decision based on the doctrine established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)—that "discrimination for failure to conform to a gender stereotype is sex discrimination under Title VII"—would have been more truthful and equitable. *See* McGinley et al., *supra* note 334, at 13.

341. *See* Katherine Franke (@ProfKFranke), TWITTER (June 15, 2020, 1:42 PM), https://twitter.com/profkfranke/status/1272585258601512962 [https://perma.cc/PAL8-CT7D] ("Had #RBG written the #Bostock decision we would have seen strong language on the fundamental importance of workplace equality as a national value."); *see also* McGinley et al., *supra* note 334, at 12.

342. CONRON & GOLDBERG, *supra* note 331, at 1.

343. *See* MALLORY, *supra* note 22, at 6.

344. *See* Grove, *supra* note 117 (defining formalistic textualism as "an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case").

345. *See id.* at 274 (noting how textualist constraints on judicial discretion "may be valuable for politically vulnerable communities"); Eyer, *supra* note 117 (arguing that textualism can and should be embraced by progressives).

346. *Cf.* Spindelman, *supra* note 23, at 606–09.

347. *See* Press Release, Wyatt Ronan, Hum. Rts. Campaign, 2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures into Law (Apr. 22, 2021), https://www.hrc.org/press-releases/2021-slated-to-become-worst-year-for-lgbtq-state-legislative-attacks [https://perma.cc/7F76-ED29].

348. *See* Press Release, Wyatt Ronan, Hum. Rts. Campaign, BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation (Mar. 13, 2021), https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation [https://perma.cc/A2DT-SQE3] (discussing, among other laws, an anti-transgender medical care bill in Texas and an anti-transgender sports bill in Michigan). In February 2022, Texas also came under fire for Governor Greg Abbott's order for state child welfare officials to start investigating the parents of transgender children for child abuse if they seek gender-affirming care for their children. Letter from Greg Abbott, Governor of Tex., to Jaime Masters, Comm'r of Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/52VB-P2U4]; *see* Sneha Dey & Karen Brooks Harper, *Transgender Texas Kids Are Terrified After Governor Orders That Parents Be Investigated for Child Abuse*, TEX. TRIB. (Feb. 28, 2022), https://www.texastribune.org/2022/02/28/texas-transgender-child-abuse/ [https://perma.cc/JZ2Q-SZSG].

to adopting *Bostock*'s ruling as a statutory matter, so state courts may be the only avenue for expanding these protections.[349]

CONCLUSION

At the beginning of the *Bostock* majority opinion, the majority noted that "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . . [But o]nly the written word is the law, and all persons are entitled to its benefit."[350] The application of *Bostock* to state antidiscrimination laws raises complex issues of statutory interpretation, federalism, political pressures, and concepts of legal justice. And the implications of *Bostock* for both federal and state law are extensive.

The five state court cases that have been litigated since June 2020 demonstrate that *Bostock*'s persuasiveness may spread beyond what the Supreme Court itself may have foreseen or intended. Although *Bostock* expanded employment protections for millions of LGBTQ+ adults, 3.6 million working people are still unprotected from employment discrimination because of their sexual orientation or gender identity.[351] While many state legislatures may continue to avoid the issue of LGBTQ+ civil rights, state courts must pick up the baton; *Bostock*, with its textualist principles and judicial authority, gives them a path to expanding LGBTQ+ legal equality.

349. *See* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599 (1999) ("[G]ay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts.").

350. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

351. *See supra* note 337 and accompanying text.