

BEYOND *BOSTOCK*: EMPLOYMENT PROTECTIONS FOR LGBTQ WORKERS NOT COVERED BY TITLE VII

*Alex Reed**

Whereas the Supreme Court recently held that LGBTQ employment bias is actionable under Title VII as a form of sex discrimination, the statute does not protect persons working at small firms, i.e., businesses with fewer than fifteen employees. For these individuals, state law provides the exclusive means of redressing workplace bias, yet only twenty-two states prohibit discrimination on the basis of sexual orientation and gender identity. This article examines a subset of the twenty-eight states lacking explicit, LGBTQ-inclusive employment protections—those with antidiscrimination statutes applying to small firms otherwise exempt from Title VII—and demonstrates that, to varying degrees, these states would be justified in construing their statutes’ existing bans on sex discrimination to protect LGBTQ workers.

INTRODUCTION	538
I. THE INCREASING DIVERGENCE OF STATE AND FEDERAL EMPLOYMENT LAW	541
A. The Case for Deference to Federal Law	543
B. The Case for Independence from Federal Law	547
II. THE <i>BOSTOCK</i> DECISION	550
III. CLOSING THE COVERAGE GAP	553
A. The States	554
B. Textualism in State Courts	555
C. State Fair Employment Statutes	561
i. Interpretive Mandates	562
ii. Definitions of “Sex”	563
iii. References to Federal Law	564
iv. Comparison of “Unlawful Employment Practices” Provisions	567
D. Findings & Implications	570

* Associate Professor of Legal Studies, Terry College of Business, University of Georgia. The author gratefully acknowledges receipt of funding for this project through a Terry-Sanford Research Award from the University of Georgia.

The author would like to thank attendees of the 2020 Academy of Legal Studies in Business conference for their insightful comments and feedback on earlier drafts of the Article.

IV. CONCLUSION	573
APPENDIX	575

INTRODUCTION

Following the Supreme Court’s ruling in *Bostock v. Clayton County*,¹ a number of major news outlets portrayed the decision as conferring employment protections on all LGBTQ Americans. These stories carried sweeping headlines like “Justices Rule LGBT People Protected from Job Discrimination,”² “U.S. Supreme Court Rules Workers Cannot Be Fired for Being LGBT+,”³ and “LGBT Workers Shielded from On-Job Bias, U.S. Supreme Court Says.”⁴ Missing from the articles was any nuance or acknowledgment that the Court’s ruling did not, in fact, extend to all LGBTQ workers. Rather, the stories portrayed *Bostock* as conceptually equivalent to and a logical extension of the Court’s earlier pro-LGBTQ decisions, wherein the Court declared unconstitutional various instances of government-sanctioned discrimination against LGBTQ persons.⁵ Unlike earlier decisions, however, the *Bostock* ruling addressed the actions of private employers, not the government, and interpreted Title VII instead of the Constitution. Ostensibly, it was this conflation of public/private discrimination and constitutional/statutory interpretation that led so many in the press to mischaracterize *Bostock* as protecting all LGBTQ Americans.⁶

1. 140 S. Ct. 1731 (2020).

2. Mark Sherman, *Justices Rule LGBT People Protected from Job Discrimination*, ASSOC. PRESS (June 15, 2020), [<https://perma.cc/82BB-9K9V>].

3. Oscar Lopez, *U.S. Supreme Court Rules Workers Cannot Be Fired for Being LGBT+*, REUTERS (June 15, 2020, 6:36 AM), <https://www.reuters.com/article/us-usa-lgbt-supremecourt-trfn/u-s-supreme-court-rules-workers-cannot-be-fired-for-being-lgbt-idUSKBN23M1AG>.

4. Greg Stohr, *LGBT Workers Shielded from On-Job Bias, U.S. Supreme Court Says*, BLOOMBERG LAW (June 15, 2020, 4:28 PM), <https://news.bloomberglaw.com/daily-labor-report/workers-cant-be-fired-for-being-gay-u-s-supreme-court-rules> [<https://perma.cc/JD98-LZTN>].

5. See Sasha Issenberg, Opinion, *There Won’t Be a Backlash Against the Court’s New Ruling on Gay Rights*, WASH. POST (June 16, 2020, 2:52 PM), https://www.washingtonpost.com/outlook/lgbtq-backlash-supreme-court/2020/06/16/73410644-aff6-11ea-8758-bfd1d045525a_story.html (“*Bostock* instantly completes a five-part canon of LGBT-rights decisions from the court since 1996, the last two of which struck down federal and state laws that treat same-sex unions differently from opposite-sex ones.”).

6. *But cf.* Erik Larson & Jeff Green, *Supreme Court LGBT Ruling Leaves Out 1 in 6 American Workers*, BLOOMBERG (June 15, 2020, 8:36 PM), <https://www.bloomberg.com/news/articles/2020-06-16/lgbtq-workers-still-face-on-job-bias-risk-from-small-businesses> (acknowledging “[t]he exclusion for smaller companies

Unlike constitutional guarantees, however, Title VII's protections do not extend to everyone. The statute's safeguards are only available to individuals working for an "employer,"⁷ defined as "a person . . . who has fifteen or more employees."⁸ Consequently, businesses with fourteen or fewer employees ("small firms") may lawfully discriminate on the basis of race, color, religion, national origin, and sex consistent with Title VII.⁹ In practice, the small firm exemption leaves more than 19 million workers vulnerable to discrimination otherwise prohibited by federal law,¹⁰ including 855,000 to 1.9 million LGBTQ persons.¹¹

Whereas many of the workers excluded from Title VII's coverage may rely on state antidiscrimination statutes to contest instances of workplace bias, the same cannot be said for LGBTQ individuals. At present, only twenty-two states expressly prohibit discrimination on the basis of sexual orientation and gender identity¹² compared to the forty-seven states banning discrimination on the basis of race, religion, national origin, and sex.¹³ *Bostock*, moreover, is not binding on the states, meaning jurisdictions that have declined to adopt explicit em-

was 'one of several subtleties that got lost in the headlines'" and observing *Bostock* "'interprets only this one statute and did not interpret the U.S. Constitution'").

7. 42 U.S.C. § 2000e-2(a) (2018).

8. 42 U.S.C. § 2000e(b) (2018). Title VII also does not protect independent contractors. See Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 179 (2006) (describing independent contractors as occupying an "antidiscrimination law 'black hole'").

9. For a detailed examination of the small firm exemption, see Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1205 (2006) (identifying five possible justifications for the small-firm exemption); see also Anna B. Roberson, *The Migrant Farmworkers' Case for Eliminating Small-Firm Exemptions in Antidiscrimination Law*, 98 TEX. L. REV. 185 (2019) (arguing such exemptions should be curtailed or eliminated altogether); Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1049 (2005) (contending that minimum employee thresholds in federal antidiscrimination statutes "should be considered limitations on the subject matter jurisdiction of the federal courts rather than elements of the federal antidiscrimination claim").

10. Carlson, *supra* note 9, at 1199; see also Larson & Green, *supra* note 6 (estimating as many as one in six Americans work at small firms).

11. These figures represent 4.5% and 10%, respectively of the estimated 19 million individuals working at small firms. See Daniel Trotta, *Some 4.5% of U.S. Adults Identify as LGBT: Study*, REUTERS (Mar. 5, 2019, 4:19 PM), <https://www.reuters.com/article/us-usa-lgbt/some-4-5-percent-of-u-s-adults-identify-as-lgbt-study-idUSKCN1QM2L6> (observing that while 4.5% of U.S. adults identify as LGBT, anonymous surveys indicate the percentage may be as high as 10%).

12. See *infra* note 102.

13. See *infra* note 18.

ployment protections for LGBTQ persons are not required to interpret state bans on sex discrimination as prohibiting LGBTQ-related bias.

This coverage gap threatens to leave many LGBTQ persons in a sort of legal limbo: unable to invoke the LGBTQ-inclusive protections conferred by Title VII because they work at a small firm and without a cognizable claim under state law because “sexual orientation” and “gender identity” are not included among the jurisdiction’s protected categories. In theory, this disparity could be resolved legislatively, either by Congress¹⁴ or the relevant state legislatures. However, a statutory approach would almost certainly fail given the inherent difficulty of passing legislation even in the most bipartisan of times,¹⁵ to say nothing of the current unprecedented polarization of American politics.¹⁶ Thus, if persons working at small firms in states without explicit LGBTQ employment protections are to secure equal opportunity in the workplace, it will have to come through state courts’ application of state law.

This Article examines a subset of the twenty-eight states that lack explicit, LGBTQ-based employment protections—those with antidiscrimination statutes governing small firms (i.e., employers with fourteen or fewer employees)¹⁷—and demonstrates that, to varying degrees, all seventeen states would be justified in construing their statutes’ existing bans on sex discrimination to protect LGBTQ workers. Part I considers the competing incentives states face in deciding whether to emulate federal law generally and federal discrimination law specifically. Part II analyzes the Supreme Court’s reasoning in *Bostock* and reveals that in declining to adopt two of the three argu-

14. Specifically, Congress could further restrict the availability of the small-firm exemption. See Carlson, *supra* note 9, at 1270 n.316 (observing that in 1972 the employee threshold was lowered from twenty-five employees to the current fifteen-employee standard).

15. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1272 (1994) (“In Congress, as in many state legislatures, numerous negative legislative checkpoints render passage of proposed legislation difficult by design.”).

16. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276 (2011) (“We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.”).

17. States with small firm exemptions comparable to or more expansive than Title VII (to the extent they define “employer” as a person having at least fifteen employees) were omitted because they do not stand to provide protections to persons who otherwise lack a means of contesting LGBTQ-related employment discrimination. Consequently, if these states were to construe their employment nondiscrimination statutes consistent with *Bostock*, the resulting protections would be supplemental of and in addition to the protections available under Title VII rather than filling a coverage gap left by Title VII. See *infra* Section III.A.

ments put forward by the plaintiffs, the Court avoided a doctrinal split that could have made it far less likely state courts would interpret their local statutes consistent with *Bostock*. Part III examines the relevant statutory texts and interpretive methodologies to establish that state courts not only may but in some instances effectively must interpret their state antidiscrimination statutes consistent with *Bostock*.

I.

THE INCREASING DIVERGENCE OF STATE AND FEDERAL EMPLOYMENT LAW

Forty-eight of the fifty states have enacted laws barring private employers from discriminating on the basis of certain characteristics.¹⁸ Known as fair employment statutes, these laws generally prohibit discrimination on the basis of an individual's race, religion, national origin, sex, age, or disability.¹⁹ It is not uncommon, moreover, for these statutes to provide greater protections and remedies than are available under federal law, such as by specifying additional protected characteristics or allowing larger damages awards.²⁰ Perhaps most significantly, state fair employment statutes oftentimes protect individuals who would otherwise be left without any recourse under federal law because they happen to work at small firms.²¹

Historically, state courts almost always interpreted their fair employment statutes consistently with federal courts' construction of Ti-

18. See James M. Oleske, Jr., "State Inaction," *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 45 n.155 (2016) ("Forty-eight states (all but Alabama and Mississippi) prohibit private employment discrimination on the basis of disability, while forty-seven states (all but Alabama, Georgia, and Mississippi) prohibit it on the basis of race, religion, national origin, and sex, and a slightly different forty-seven states (all but Arkansas, Mississippi, and South Dakota) prohibit it on the basis of age.").

19. *Id.*

20. 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, 156 (2009) ("Even today many states provide *uncapped* compensatory and punitive damages for intentional employment discrimination (or they provide caps higher than those in the federal law); Title VII damages remain capped at \$50,000 for smaller businesses and \$300,000 for even the largest corporations."); see also Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 126 (2018) (observing Title VII establishes a floor rather than a ceiling so that states may prohibit employment discrimination on the basis of characteristics not found in Title VII).

21. See Daniel Lewallen, *Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes*, 47 IND. L. REV. 817, 821–22 (2014) (noting fourteen states have eliminated the small-firm exemption entirely while another twenty states have curtailed its application).

tle VII.²² This was primarily attributable to considerable overlap in the statutes' text—at least initially.²³ Whereas a number of states had enacted fair employment statutes prior to 1964, most of these statutes were subsequently revised and brought into conformity with Title VII.²⁴ Conversely, many of the states that had not yet adopted employment protections seized on the momentum created by the Civil Rights Act to enact fair employment statutes closely tracking Title VII.²⁵ The early similarity between state and federal law effectively allowed state courts to outsource matters of statutory interpretation to the federal judiciary, thereby ensuring that state antidiscrimination law would remain derivative of and coextensive with cognate federal law.²⁶

Recently, however, “a number of state appellate courts . . . have declined to follow federal court interpretations of employment discrimination statutes when dealing with their own parallel state statutes.”²⁷ Examples range from the circumstances under which an employer may be held vicariously liable for supervisory sexual harassment,²⁸ to the causation standard for retaliatory discharge claims,²⁹ to the evidentiary showing necessary for a mixed-motive instruction.³⁰ These decisions, moreover, are not mere aberrations or the result of some fleeting, temporary phenomenon.³¹ Rather, the trend of state

22. 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) (observing that “state courts sometimes appear to bend over backwards” to construe state antidiscrimination statutes consistent with federal law).

23. *Id.* at 473. But see Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 582 (2013) (“[I]t is debatable whether the majority of the state statutes have the same design as the federal statutes, even confining that observation to the statutes as originally enacted.”).

24. Long, *supra* note 22, at 476.

25. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 720–21 (2016) (“After Title VII, most states swiftly and successfully enacted laws substantially mirroring Title VII’s provisions.”).

26. See *id.* at 721 (contending “states have approached antidiscrimination lawmaking principally by plagiarizing the federal statutes” which in turn has allowed state courts to “conform to federal court interpretations of federal statutes with relatively paltry analysis of countervailing considerations”).

27. Long, *supra* note 22, at 473.

28. *Chambers v. Tretco, Inc.*, 614 N.W.2d 910, 918 (Mich. 2000).

29. *Haskenhoff v. Homeland Energy Sols. L.L.C.*, 897 N.W.2d 553, 585 (Iowa 2017).

30. *Harris v. City of Santa Monica*, 294 P.3d 49, 58–60 (Cal. 2013).

31. See Long, *supra* note 22, at 483–505 (identifying four factors contributing to the increased divergence of state and federal discrimination law: the greater number of lawsuits being filed in state courts, the increasing complexity of employment discrimination law at both the state and federal levels, the mounting pressure on state courts and legislatures to respond to controversial federal rulings, and the growing schism in state and federal judges’ approach to statutory interpretation).

courts declining to follow federal courts' interpretation of Title VII is likely to continue and even accelerate over time as textual differences between Title VII and state fair employment statutes become both more pervasive and more pronounced.³²

Whether consistency between state and federal employment law is desirable from a normative standpoint is outside the scope of this Article. Nevertheless, an appreciation of the competing motivations states face in deciding whether to mimic or break with federal law is helpful in evaluating *Bostock's* potential persuasiveness outside the federal judiciary.

A. *The Case for Deference to Federal Law*

There are a number of reasons states may wish to co-opt federal law. One is the conservation of scarce resources.³³ Drafting legislation can be a slow, painstaking process requiring the participation of numerous individuals over an extended period of time.³⁴ Likewise, resolving questions of statutory interpretation often requires consideration of written briefs as expanded upon by oral argument, followed by a period of research, reflection, and opinion writing by one or more judges.³⁵ Yet, these costs may largely be avoided by incorporating the text of an existing federal statute into a new or revised state statute and then deferring questions of statutory interpretation to federal courts.³⁶

32. See Sperino, *supra* note 23, at 568 (“[E]ven if there were reasons early in the history of employment discrimination law to read state law . . . in sync with federal law, those reasons are becoming less compelling with the passage of time.”).

33. Dodson, *supra* note 25, at 730–32.

34. For a detailed discussion of the state legislative drafting process, see Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 *YALE L.J.* 438, 444–49 (2016) (observing legislative drafting offices are present in all fifty state legislatures and that “[m]any of the offices offer not only bill-drafting services but also related legislative services—providing research on request to members of the state legislature, performing fiscal analyses of proposed bills, maintaining a legislative reference library, and preparing and arranging statutes for publication”). Cf. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *COLUM. L. REV.* 807, 807 (2014) (noting that “modern [federal] statutes are carefully researched by professional researchers and clearly drafted by nonpartisan professional legislative drafters, with the entire process overseen by hundreds of specialized committee staff and countless lobbyists”).

35. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. REV.* 1, 27–29 (1995) (“The very fact that a controversy over statutory interpretation has found its way to a state’s high court—quite possibly after several other trial and appellate judges have divided on the question—signals that discerning the statutory meaning may not be quite so simple . . . [as] consulting a good dictionary or communing with the statutory text.”).

36. Dodson, *supra* note 25, at 730–31.

In the words of one commentator, if federal law has proven workable—or at least defensible—“[w]hy reinvent the wheel?”³⁷

Furthermore, states may choose to emulate federal law in order to capture the advantages conferred by state/federal parity. These benefits are generally understood to include “(1) predictability within a particular geographic region; (2) simplicity, clarity, and efficiency by reducing variation; (3) the appearance of neutrality; and (4) the enhancement of reputation by evincing unanimity and consistency.”³⁸ It has also been suggested that vertical uniformity inhibits forum shopping, lessens the burdens associated with federal courts’ exercise of supplemental jurisdiction, and simplifies understanding of individual rights and obligations.³⁹

States may also elect to appropriate federal law as a means of protecting state judges and legislators against political backlash.⁴⁰ Legislative drafting choices, like matters of statutory interpretation, are susceptible to criticism on an almost infinite variety of grounds.⁴¹ The more controversial a particular state statute or appellate court decision, the more likely the relevant party is to be the target of criticism.⁴² By enacting a state version of a contentious federal statute, legislators may be able to mitigate some of the political consequences they would face had they developed the legislation independently.⁴³ Similarly, in adopting verbatim the reasoning of federal courts, a state judge—who, unlike her federal counterparts, may have to run for re-

37. *Id.* at 730.

38. *Id.* at 732–33. For elaboration on the benefits of state/federal parity, see Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 *VILL. L. REV.* 311, 311–12 (2001).

39. Dodson, *supra* note 25, at 736.

40. *Id.* at 739–44.

41. See Karl Stampfl, Book Note, *When Good Enough Is Not Good Enough*, 110 *MICH. L. REV.* 1191, 1193 (2012) (reviewing LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* (2010)) (“Statutes cannot be simultaneously flexible enough to absorb new situations and precise enough that their application is clear in all situations.”).

42. See, e.g., Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 *YALE L. & POL’Y REV.* 83, 139–40 (2017) (noting North Carolina agreed to revise a state statute discriminating against transgender persons after enduring widespread criticism and boycotts).

43. See, e.g., Ben Nadler, *Controversial Georgia ‘Religious Liberties’ Bill Stalls*, *ASSOC. PRESS* (Mar. 4, 2019), <https://apnews.com/b588b00d0728401d95e42bcb> (reporting the author of a controversial state bill “said it was drafted to mirror the Religious Freedom Restoration Act, a federal law passed by Congress in 1993 and signed by President Bill Clinton, with some slight changes to accommodate state law”).

election—may be able to avoid some of the political blowback she would have received had she resolved the matter independently.⁴⁴

Whereas the preceding discussion addressed states' motivations for co-opting federal law generally, there are a number of reasons state courts may wish to follow federal law in the area of employment discrimination specifically. Each of these rationales is based on a common premise that “[d]espite the criticisms often leveled at federal judges concerning the development of employment discrimination law, there are relatively few issues about which it can be said that the courts have gotten it objectively wrong,” and conversely “[t]here are many instances on which the consensus is that the federal courts have more or less gotten it right.”⁴⁵ Thus, given the relative competency and reliability of federal courts, states may choose to adopt parallel interpretations of employment discrimination laws for the sake of legislative preference, legislative efficiency, and judicial credibility.⁴⁶

State legislatures' ostensible preference that fair employment statutes be construed consistently with Title VII is predicated on the borrowed statute rule.⁴⁷ Pursuant to the rule, “courts assume that when a legislature adopts a statute similar or identical to one in another jurisdiction, the legislature also adopts judicial interpretations of that statute from the originating jurisdiction.”⁴⁸ Rephrased for the purposes of the present discussion, the rule may be expressed as follows: “[A] reasonable assumption from the fact that a state based the substance of its employment discrimination law on federal law . . . is that the state legislature liked the substance of the federal statute and the decisional law as it existed under that statute at the time of enactment.”⁴⁹ It can be argued, moreover, that there is no reason why the rule should be limited to interpretations in existence at the time of borrowing: “The initial decision to borrow federal law . . . can reasonably be viewed as establishing a general preference in favor of future parallel construction of the state statutes, provided that those constructions are reasona-

44. Dodson, *supra* note 25, at 740.

45. Long, *supra* note 22, at 524. Cf. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 277 (1988) (observing “institutional factors such as more and better law clerks, lower caseloads, and more frequent handling of constitutional issues may produce more technical competence in federal courts than in the state judiciaries”).

46. Long, *supra* note 22, at 524–39.

47. *Id.* at 527–28. For a detailed history of the borrowed statute rule, see Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 515–16 n.9 (2002).

48. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 376 (2010).

49. Long, *supra* note 22, at 527.

ble and generally consistent with the progression of federal law existing at the time of borrowing.”⁵⁰ While prospective application of the rule continues to be controversial,⁵¹ the rule’s retrospective application is widely accepted and seemingly provides a compelling justification for courts to interpret fair employment statutes consistent with Title VII, at least through the date of enactment.

The legislative efficiency justification for parallel construction of state and federal discrimination statutes stems from the premise that state legislatures are ill-equipped to monitor and respond to the steady stream of interpretive decisions coming out of state appellate courts.⁵² Accordingly, a presumption in favor of parallel construction allows state legislatures to more or less “check out” insofar as matters of statutory interpretation are concerned while having confidence that only in the most exceptional of circumstances will state courts construe fair employment statutes contrary to Title VII.⁵³

A final justification for parallel construction of state and federal discrimination statutes is the preservation of judicial credibility.⁵⁴ Divergent interpretations of similar or even identical statutory provisions threatens to undermine the public’s trust in the judiciary.⁵⁵ Compared to the constitutional realm, where conflicting interpretations of analogous state/federal provisions are more readily justifiable owing to both the complexity and brevity of the underlying text, the interpretation of parallel statutory provisions should be relatively consistent given that the text is often “more dense and more concrete” than its constitutional counterpart.⁵⁶ Consequently, a state court that interprets its fair employment statute contrary to federal courts’ otherwise reasonable

50. *Id.* at 528.

51. New Mexico explicitly rejects prospective application of the rule. *See* N.M. STAT. ANN. § 12-2A-20(B)(1) (2018) (stating courts should consider the “settled judicial construction in another jurisdiction as of the time a statute or rule is borrowed from the other jurisdiction”).

52. Long, *supra* note 22, at 531; *see also* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228–29 (1993) (“[M]any state legislatures meet for only short and intermittent sessions, and the legislators themselves are often only part-time politicians with other livelihoods that require attention. State legislative staffs are smaller and less regimented than their federal counterparts.”).

53. *See* Long, *supra* note 22, at 531 (“While state legislatures may be better positioned and more likely to ‘correct’ judicial decisions with which it disagrees than is Congress, state legislative resources are also limited, and state legislatures remain somewhat ‘sluggish’ in responding to judicial decisions.”).

54. *Id.* at 538–39.

55. *Id.*

56. *Id.* at 538.

interpretation of Title VII is vulnerable to accusations of results-oriented judging.⁵⁷ Such real or perceived judicial activism threatens to undercut faith in the judiciary as a neutral institution committed to calling balls and strikes rather than winners and losers.⁵⁸

B. *The Case for Independence from Federal Law*

Conversely, there are also a number of reasons states may wish to limit federal law's influence on state law. Each of these rationales is predicated on principles of federalism—specifically, the idea that states must develop their own distinct bodies of law free of the federal government's influence.⁵⁹ In doing so, states ostensibly fulfill their constitutional responsibilities while at the same time safeguarding their unique powers and privileges against federal encroachment.

Broadly, one reason states may resist the wholesale adoption of federal law is to preserve their own legitimacy.⁶⁰ Unlike federal law, state law may be tailored to address the unique needs and preferences of a discrete group of persons.⁶¹ Greater legal customization, in turn, allows states to be seen as more responsive and more effective than the federal government in addressing citizens' daily needs.⁶² By exhibiting institutional competency together with perceived concern for the governed, states reinforce their legitimacy as distinct governing entities within the federalist system.⁶³

57. *Id.*; see also Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 202–04 (1989) (noting the frequency with which federal judges "reach different conclusions about what statutes mean, and unless the readers are outright dishonest, these differences can likely be attributed to the personality traits and political values these readers bring to their perception of the statute").

58. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005)* (statement of John G. Roberts, Jr., J., D.C. Circuit) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

59. See generally THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").

60. Dodson, *supra* note 25, at 746–47.

61. *Id.* at 747.

62. Erwin Chemerinsky, Dunwoody Distinguished Lecture in Law, *The Values of Federalism*, 47 FLA. L. REV. 499, 527 (1995); see also Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 839 (1999) (observing the "Founders believed that decentralized lawmaking would allow each state to enact laws that reflect the particular circumstances and values of its citizens").

63. See generally Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332–33, 338–53 (2003) (examining "vertical competition between the states and the federal government for the

Another reason states may elect to develop their own body of law free of federal influence is to protect their status as quasi-independent sovereigns.⁶⁴ As observed by Justice Clarence Thomas, “[s]tates, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government” but instead “entered the Union with their sovereignty intact.”⁶⁵ Yet, “[w]hen states follow federal law without independent consideration of state structures and values, they risk appearing to be secondary afterthoughts of the federal government rather than intellectual equals.”⁶⁶ Such reflexive following ostensibly undermines states’ authority in exercising the vast police powers entrusted to them under the Supremacy Clause while simultaneously allowing the federal government to exert influence in excess of its enumerated powers.⁶⁷ Accordingly, states’ routine, uncritical following of federal law threatens to undermine a key tenet of federalism by effectively demoting the states from sovereigns to subjects.

Additionally, states may decline to adopt a legal regime mirroring the federal system in order to preserve the independence of state law.⁶⁸ Over time, a state’s following of federal law can create a kind of momentum whereby deference begets more deference. Professor Scott Dodson refers to this phenomenon as “cyclical entrenchment,” explaining “[j]ust as a black hole attracts more mass, making its gravitational pull ever stronger, following’s effects inculcate institutional norms that then compound the lure of following.”⁶⁹ Thus, the more dependent a state is on federal law, the more difficult it would be for that state to one day reassert its independence and innovate its own legal principles as the state’s legislators, judges, and attorneys will already be primed for deference and have a vested interest in preserving the status quo.⁷⁰

Whereas the preceding discussion examined states’ motivations for seeking to limit the influence of federal law generally, there are a number of reasons they may wish to do so in the context of employment discrimination law specifically. These justifications cast doubt

people’s ‘affection’” and concluding that “[t]he more areas . . . a government regulates satisfactorily, the greater the affection it can expect to earn and thus the greater the responsibilities it can expect citizens to confer upon it”).

64. Dodson, *supra* note 25, at 748–51.

65. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002).

66. Dodson, *supra* note 25, at 748.

67. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 330 (1997).

68. Dodson, *supra* note 25, at 751–52.

69. *Id.* at 751.

70. *Id.* at 752.

on the legislative preference and judicial credibility concerns discussed in Section I.A. as ostensibly militating in favor of parity.

State legislatures' perceived preference that fair employment statutes be construed consistently with Title VII has been criticized for its reliance on prospective application of the borrowed statute rule.⁷¹ Recall that the rule's prospective application is predicated on an assumption that "the initial decision to borrow federal law . . . can reasonably be viewed as establishing a general preference in favor of future parallel construction of the state statutes."⁷² However, "[a]n equally strong presumption . . . might hold in the opposite direction [–]state legislatures would have little reason to enact separate discrimination statutes if they expected or wanted their citizens' rights under the statutes to be exactly duplicative of their rights under federal analogues."⁷³ Because both assumptions are equally plausible, critics contend the legislative preference justification is effectively a wash, neither supporting nor opposing parallel construction.⁷⁴

Likewise, the notion that state and federal employment discrimination statutes should be construed consistently to preserve judicial credibility has been disparaged for its ostensible naiveté.⁷⁵ As observed by one commentator, "too much state following of federal law poses legitimacy concerns at least as grave as those raised by too little following."⁷⁶ Under this view, state courts construing fair employment statutes in lockstep with federal law risk being seen as mere agents of the federal judiciary, de facto U.S. Marshals whose sole responsibility is to execute the judgments of their smarter, more competent federal counterparts. This risk is especially acute where state courts "follow even abrupt and counterintuitive changes in federal law" without first evaluating whether such changes are warranted under the corresponding state analog.⁷⁷ Accordingly, the judicial credibility justification for parallel construction also appears to be a wash, with fervent following as likely to undermine state courts' legitimacy as irrational independence.

71. Kevin J. Koai, Note, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763, 791 (2019).

72. Long, *supra* note 22, at 528.

73. Koai, *supra* note 71, at 791.

74. *See id.* at 791–92 ("The point here is not that one presumption regarding legislative preference is more defensible than the other; the point is that appeals to legislative preference do not necessarily support parallel construction.").

75. *Id.* at 794.

76. *Id.*

77. Dodson, *supra* note 25, at 705.

The various justifications for and against parallel construction of employment nondiscrimination laws, thus, are of limited assistance in assessing whether state courts will construe their fair employment statutes consistent with the Supreme Court's ruling in *Bostock*. Likewise, the fact that states historically have been inclined to interpret their fair employment statutes in tandem with Title VII but now find themselves confronting conditions increasingly favoring divergent interpretations makes it difficult to predict whether states will follow *Bostock* and interpret their statutes' existing bans on sex discrimination to protect LGBTQ workers.

II.

THE *BOSTOCK* DECISION

Although styled *Bostock v. Clayton County*, the Supreme Court's decision actually resolved three distinct cases. Two of the cases, including *Bostock*, sought to determine whether discrimination based on an individual's sexual orientation is actionable under Title VII as a form of sex discrimination⁷⁸ while the third posed a similar question, albeit in the context of gender identity discrimination.⁷⁹ The plaintiffs in these cases collectively put forward three arguments for why the Supreme Court should interpret Title VII to prohibit LGBTQ-related bias. Significantly, however, only one of these rationales was likely to prove persuasive to state courts, and that rationale was the exclusive basis for the Supreme Court's ruling in *Bostock*.

The plaintiffs' first argument was that sexual orientation/gender identity discrimination is sex discrimination under a straightforward reading of the statutory text (the textualist rationale).⁸⁰ This approach begins by quoting Title VII's "unlawful employment practices" provision, which makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's . . . sex."⁸¹ Next, it notes the phrase "because of" has been interpreted to require but-for causation, as reflected in the Court's articulation of a "simple

78. *Bostock v. Clayton Cnty.*, 723 Fed. Appx. 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1618); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623).

79. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).

80. Opening Brief for Respondents at 19–23, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020) (No. 17-1623), 2019 WL 2745391 [hereinafter *Zarda Brief*]; Brief for Petitioner at 12–18, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No. 17-1618), 2019 WL 2763119 [hereinafter *Bostock Brief*]; Brief for Respondent Aimee Stephens at 20–28, *R.G. & G.R. Harris Funeral Homes v. Equal Emp't Opportunity Comm'n*, 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 2745392 [hereinafter *Stephens Brief*].

81. 42 U.S.C. § 2000e-2(a)(1).

test” for evaluating claims of sex discrimination: “[W]hether the evidence shows treatment of a person in a manner which *but for* that person’s sex would be different.”⁸² The argument then observes that under a but-for causation standard, sex need not be the sole or even primary cause of discrimination to establish liability.⁸³ Rather, “[a]n employer acts because of sex anytime it takes sex into account—either standing alone, or in combination with some other fact about the employee,”⁸⁴ and since an employer cannot consider an employee’s sexual orientation or gender identity without also considering the employee’s sex, LGBTQ discrimination is necessarily sex discrimination.⁸⁵

The second argument was that sexual orientation/gender identity discrimination is unlawful because it relies on sex-based stereotypes (the sex-stereotypes rationale).⁸⁶ This approach is predicated on the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, where the Court famously declared, “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” for in forbidding sex discrimination, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁸⁷ With regard to sexual orientation, the argument may be summarized as follows: “Discrimination against men and women for being lesbian, gay, or bisexual necessarily penalizes them for not conforming to” the sex-based stereotype “that men should be attracted only to women and women should be attracted only to men.”⁸⁸ Similarly, the argument as it pertains to gender identity is that “discrimination against an employee for being transgender inherently enforces the specific sex-based stereotype that persons assigned a particular sex at birth will identify, appear, and behave in ways seen as typical of that sex throughout their entire lives, and therefore always violates Title VII.”⁸⁹

82. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (emphasis added).

83. Stephens Brief, *supra* note 80, at 21–23.

84. Zarda Brief, *supra* note 80, at 18.

85. Bostock Brief, *supra* note 80, at 17.

86. *Id.* at 23–29; Stephens Brief, *supra* note 80, at 28–36; Zarda Brief, *supra* note 80, at 23–31.

87. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

88. Zarda Brief, *supra* note 80, at 25.

89. Stephens Brief, *supra* note 80, at 29.

The third and final argument was that sexual orientation discrimination constitutes associational sex discrimination (the associational-discrimination rationale).⁹⁰ Associational discrimination “refers to discrimination based on a worker’s protected traits and the traits of those persons with whom the worker has a relationship.”⁹¹ The concept originated as a means by which Caucasian persons subjected to discrimination on the basis of their involvement in interracial relationships would be able to state viable claims of race discrimination.⁹² Courts once routinely dismissed such claims on the grounds the plaintiffs were attempting to appropriate the protected racial status of their African-American partners.⁹³ Eventually, however, courts began to recognize that “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”⁹⁴ The associational-discrimination rationale seeks to extend this logic to same-sex relationships: If an employee is subjected to adverse action because an employer disapproves of same-sex association, the employee suffers discrimination because of the employee’s own sex.

In the end, the Supreme Court relied exclusively on the textualist rationale to hold that Title VII prohibits discrimination against LGBTQ persons. Justice Gorsuch, writing for the majority, began by emphasizing the primacy of the statutory text, observing that “only the words on the page constitute the law adopted by Congress and approved by the President.”⁹⁵ He then confirmed that Title VII employs a but-for causation standard such that “sex” need not be the sole or even primary cause of an adverse employment action to give rise to liability.⁹⁶ Indeed, Justice Gorsuch acknowledged that “[w]hen an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual’s sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn’t care.”⁹⁷ If the individual would not have been discriminated against had they been of a different sex, the statute’s causation standard is satisfied.⁹⁸ Accord-

90. Bostock Brief, *supra* note 80, at 18–23; Zarda Brief, *supra* note 80, at 31–36.

91. Zarda Brief, *supra* note 80, at 31.

92. See Alex Reed, *Associational Discrimination Theory & Sexual Orientation-Based Employment Bias*, 20 U. PA. J. BUS. L. 731, 749 (2018).

93. *Id.*

94. *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

95. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

96. *Id.* at 1739.

97. *Id.* at 1742.

98. *Id.*

ingly, if an employer considers two employees, one of whom is male and the other female, to be materially identical in all respects but fires the male employee for being attracted to men while retaining the female employee who is attracted to men, the male employee's sex is a but-for cause of his termination.⁹⁹ Justice Gorsuch, therefore, concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."¹⁰⁰

As will be discussed in greater detail in Section III.B., the fact that *Bostock* relied exclusively on the textualist rationale stands to maximize its potential persuasiveness to state courts. Whereas the sex-stereotypes and associational-discrimination rationales have been embraced by numerous federal courts to combat instances of sex and race discrimination, respectively, to date neither theory has gained widespread acceptance in state courts in any context, much less as a means of redressing discrimination against LGBTQ persons. Conversely, textualism is the dominant means of statutory interpretation in most state court systems.¹⁰¹ Thus, when confronted with the question of whether LGBTQ bias constitutes actionable sex discrimination, state courts are significantly more likely to rely on *Bostock* and hold in the affirmative than if the Court had relied on the sex-stereotypes and/or associational-discrimination rationales.

III.

CLOSING THE COVERAGE GAP

The coverage gap created by *Bostock* threatens to leave many LGBTQ persons in legal limbo: unable to invoke the LGBTQ-inclusive protections conferred by Title VII because they work at a small firm and without a cognizable claim under state law because "sexual orientation" and "gender identity" are not included among the jurisdiction's protected categories. This Part examines a subset of the twenty-eight states lacking explicit, LGBTQ-based employment protections—specifically, those with nondiscrimination statutes governing small firms (i.e., employers with fourteen or fewer employees)—and reveals that, to varying degrees, courts in all seventeen states would be justi-

99. *Id.* at 1741. Likewise, if an employer fires someone who was identified as male at birth but now identifies as female while retaining an otherwise identical employee who identifies as female but was identified as female at birth, the first employee's sex is a but-for cause of her discharge. *Id.* at 1741–42.

100. *Id.* at 1741.

101. *See infra* note 108.

fied in interpreting their fair employment statutes to prohibit anti-LGBTQ bias.

A. *The States*

The relevant state data set was compiled using an iterative process of elimination. The first step was to remove the twenty-two states in which private employers are explicitly barred by statute from discriminating on the basis of sexual orientation and gender identity.¹⁰² Next, four states were eliminated because their fair employment statutes either do not extend to the private sector¹⁰³ or do not include “sex” as a protected characteristic.¹⁰⁴ Of the twenty-four states remaining, seven were then struck because they contain a small-firm

102. See CAL. GOV'T CODE § 12940 (West 2020); COLO. REV. STAT. ANN. §§ 24-34-301, -402 (West 2020); CONN. GEN. STAT. ANN. §§ 46a-60, -81c (West 2020); DEL. CODE ANN. tit. 19, § 711 (West 2020); HAW. REV. STAT. ANN. § 378-2 (West 2020); 775 ILL. COMP. STAT. ANN. 5/1-103, 5/102 (West 2020); IOWA CODE ANN. § 216.6 (West 2020); ME. REV. STAT. ANN. tit. 5, §§ 4553, 4572 (2020); MD. CODE ANN., STATE GOV'T § 20-606 (West 2021); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2020); MINN. STAT. ANN. §§ 363A.03, .08 (West 2020); NEV. REV. STAT. ANN. § 613.330 (West 2020); N.H. REV. STAT. ANN. § 354-A:7 (2020); N.J. STAT. ANN. § 10:5-12 (West 2020); N.M. STAT. ANN. § 28-1-7 (West 2020); N.Y. EXEC. LAW § 296 (McKinney 2020); OR. REV. STAT. ANN. §§ 174.100, 659A.030 (West 2020); 28 R.I. GEN. LAWS ANN. § 28-5-7 (West 2020); UTAH CODE ANN. § 34A-5-106 (West 2020); VT. STAT. ANN. tit. 21, § 495 (West 2020); VA. CODE ANN. § 2.2-3905 (West 2020); WASH. REV. CODE ANN. §§ 49.60.040, .180 (West 2020). For a visual depiction, see Jess Bravin & Brent Kendall, *Supreme Court Rules for Gay and Transgender Rights in the Workplace*, WALL ST. J. (June 15, 2020, 6:33 PM), <https://www.wsj.com/articles/supreme-court-rules-for-gay-rights-in-the-workplace-11592230310> (providing a map of state-level employment protections for LGBTQ persons).

103. See GA. CODE ANN. §§ 45-19-22, -29 (West 2020) (prohibiting public employers from discriminating on the basis of race, color, religion, national origin, sex, disability, or age). Georgia does prohibit certain private employers from discriminating on the basis of age, disability, or sex. *Id.* §§ 34-1-2, -5-3, -6A-4. However, the sex discrimination ban is limited to sex-based pay discrimination; other forms of sex-based discrimination are permitted (i.e., not prohibited). *Id.* § 34-5-3; see also MISS. CODE ANN. §§ 25-9-149, 43-6-15 (2021) (prohibiting public employers from discriminating on the basis of race, color, religion, sex, national origin, age, handicap, or disability).

104. See ALA. CODE §§ 25-1-20 to -21 (2020) (prohibiting private employers with 20 or more employees from discriminating on the basis of age); W. VA. CODE ANN. §§ 5-11-3, -9 (West 2020) (prohibiting private employers with 12 or more employees from discriminating on the basis of disability or visual impairment).

Although the West Virginia Code does not classify sex-based employment bias as an unlawful discriminatory practice, elsewhere the Code defines the term “discriminate” to include denial of equal employment opportunities on the basis of sex and declares equal opportunity in the area of employment “to be a human right or civil right of all persons without regard to . . . sex.” W. VA. CODE ANN. §§ 5-11-2, -3(h) (West 2020). Because the Code does not expressly designate sex bias as an unlawful discriminatory practice, however, West Virginia was excluded from further consideration for the purposes of this Article.

exemption comparable to or more expansive than the small-firm exemption found in Title VII.¹⁰⁵ The resulting data set contained seventeen states, each of which prohibits private employers from discriminating on the basis of sex and has a narrower small-firm exemption than Title VII but lacks explicit employment protections for LGBTQ workers.¹⁰⁶

B. *Textualism in State Courts*

Of the seventeen states under consideration, sixteen have embraced textualism¹⁰⁷ as their default method of statutory interpreta-

105. See ARIZ. REV. STAT. ANN. §§ 41-1461, -1463 (2020) (defining “employer” as a person who has 15 or more employees); FLA. STAT. ANN. §§ 760.02, .10 (West 2020) (same); LA. STAT. ANN. §§ 23:302, :332 (2020) (20 or more employees); NEB. REV. STAT. ANN. §§ 48-1102, -1104 (West 2020) (15 or more employees); N.C. GEN. STAT. § 143-422.2 (2020) (same); S.C. CODE ANN. §§ 1-13-30, -80 (2020) (same); TEX. LAB. CODE ANN. §§ 21.002, .051 (West 2019) (same).

106. See ALASKA STAT. §§ 18.80.220, .300 (2020) (defining “employer” as a person who has 1 or more employees); ARK. CODE ANN. §§ 16-123-102, -107 (2021) (9 or more employees); IDAHO CODE §§ 67-5902, -5909 (2020) (5 or more employees); IND. CODE ANN. §§ 22-9-1-2, -3 (West 2020) (6 or more employees); KAN. STAT. ANN. §§ 44-1002, -1009 (West 2021) (4 or more employees); KY. REV. STAT. ANN. §§ 344.030, .040 (West 2019) (8 or more employees); MICH. COMP. LAWS ANN. §§ 37.2201-02 (West 2020) (1 or more employees); MO. ANN. STAT. §§ 213.010, .055 (West 2020) (6 or more employees); MONT. CODE ANN. §§ 49-2-101, -303 (West 2019) (1 or more employees); N.D. CENT. CODE §§ 14-02.4-02, -03 (2019) (same); OHIO REV. CODE ANN. §§ 4112.01, .02 (West 2020) (4 or more employees); OKLA. STAT. ANN. tit. 25, §§ 1301-02 (West 2021) (1 or more employees); 43 PA. STAT. AND CONS. STAT. ANN. §§ 954-55 (West 2021) (4 or more employees); S.D. CODIFIED LAWS §§ 20-13-1, -10 (2020) (1 or more employees); TENN. CODE ANN. §§ 4-21-102, -401 (2020) (8 or more employees); WIS. STAT. ANN. §§ 111.32, .321 (West 2020) (1 or more employees); WYO. STAT. ANN. §§ 27-9-102, -105 (2020) (2 or more employees).

107. As used here, this term includes “modified textualism.” See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) (coining the term “modified textualism”).

Professor Gluck describes modified textualism as differing from “original” or “pure” textualism in two respects: “it ranks interpretive tools in a clear order—textual analysis, then legislative history, then default judicial presumptions—and it includes legislative history in the hierarchy.” *Id.* Pure textualism, conversely, moves from textual analysis (as informed by contemporaneous dictionary definitions and the text’s relation to the broader statute/body of federal law) to the various substantive canons of construction. *Id.* at 1762–63. Professor Gluck, nevertheless, contends that modified textualism is consistent with pure textualism’s aim of minimizing judicial interpretive discretion. *Id.* at 1839. Specifically, she observes that “allow[ing] judges to freely select among the roughly sixty policy-based substantive canons” poses a much greater risk of activism and results-oriented judging than limiting judges to the legislative history. *Id.* at 1839–40. Consequently, “[m]odified textualism is textualism.” *Id.* at 1834.

tion.¹⁰⁸ While “textualism does not admit of a simple definition, . . . in practice [it] is associated with the basic proposition that[, when interpreting statutes,] judges must seek and abide by the public meaning of the enacted text, understood in context.”¹⁰⁹ Textualists give primacy to statutory text because only the text has “run the gamut of the [legislative] process.”¹¹⁰ Textualism, moreover, seeks to limit the role of subjectivity in the interpretive process by emphasizing “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”¹¹¹

Two of the seventeen states examined in this Part—Michigan and Wisconsin—were studied extensively by Professor Gluck and found to practice modified textualism. *Id.* at 1798–1811. While acknowledging further research is necessary, Professor Gluck indicates that another eight of the seventeen “may” be practicing modified textualism: Idaho, Kansas, Montana, North Dakota, Ohio, Pennsylvania, South Dakota, and Wyoming. *Id.* at 1844 n.353.

108. *See, e.g.*, *Steve’s Auto Ctr. of Conway, Inc. v. Ark. State Police*, 592 S.W.3d 695, 699 (Ark. 2020); *Nelson v. Evans*, 464 P.3d 301, 306–07 (Idaho 2020); *In re Estate of Kent*, 99 N.E.3d 634, 638–40 (Ind. 2018); *State ex rel. Schmidt v. Kelly*, 441 P.3d 67, 73 (Kan. 2019); *Overstreet v. Kindred Nursing Ctrs. Ltd.*, 479 S.W.3d 69, 73 (Ky. 2015); *Devillers v. Auto Club Ins.*, 702 N.W.2d 539, 551–53 (Mich. 2005); *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 665, 668–69 (Mo. 2010); *City of Bozeman v. Lehrer*, 459 P.3d 850, 852–53 (Mont. 2020); *PHI Fin. Servs., Inc. v. Johnston L. Off., P.C.*, 937 N.W.2d 885, 889–90 (N.D. 2020); *Rockies Express Pipeline, L.L.C. v. McClain*, 150 N.E.3d 895, 898 (Ohio 2020); *Heath v. Guardian Interlock Network, Inc.*, 369 P.3d 374, 378–79 (Okla. 2016); *Commonwealth v. Smith*, 221 A.3d 631, 636 (Pa. 2019); *Olson v. Butte Cnty. Comm’n*, 925 N.W.2d 463, 464–66 (S.D. 2019); *State v. Welch*, 595 S.W.3d 615, 621–22 (Tenn. 2020); *Lamar Cent. Outdoor, L.L.C. v. Div. of Hearings & Appeals*, 936 N.W.2d 573, 579, 585 n.19 (Wis. 2019); *Phoenix Vintners, L.L.C. v. Noble*, 423 P.3d 309, 313, 314 n.1 (Wyo. 2018).

The only state not embracing textualism is Alaska. *See Cora G. v. Dep’t of Health & Soc. Servs.*, 461 P.3d 1265, 1277 (Alaska 2020) (“When determining a statute’s meaning, we consider three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute.”). Alaska will likely follow *Bostock* all the same, however, as the Alaska Supreme Court has “repeatedly” held that its fair employment statute “is intended to be more broadly interpreted than federal law.” *Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004).

109. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005). For a succinct comparison of textualism and purposivism, see Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1898–1905 (2008). For a more detailed analysis, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

110. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 64 (1988) (describing the legislative process as “committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on.”).

111. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997); *see also* Easterbrook, *supra* note 110, at 65 (“We should look at the statutory

Each of these principles features prominently in the relevant states' supreme court opinions. The Supreme Court of Kansas, for example, has emphasized that “[w]hen interpreting a statute, a court first attempts to discern legislative intent through the statutory language, giving common words their ordinary meanings. When the language is plain and unambiguous, the court must give effect to its express language, rather than determine what the law should be.”¹¹² Similarly, in seeking to determine the “common, ordinary, and accepted meaning of a word . . . at the time of enactment,” the Supreme Court of Ohio recently consulted contemporaneous dictionary definitions and declined to consider “extraneous sources of legislative intent” where the text was otherwise unambiguous.¹¹³ The Supreme Court of Wisconsin, meanwhile, has stressed the importance of considering provisions in context relative to the corpus juris: “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes.”¹¹⁴

Textualism's emergence as the dominant method of statutory interpretation in the states is consistent with the experience of federal courts.¹¹⁵ After hewing to purposivism for decades,¹¹⁶ the federal judiciary began embracing textualism in the late 1980s,¹¹⁷ a trend that would accelerate over the next twenty years. Indeed, by 2010 federal courts' transition to textualism was nearly complete, leading one scholar to declare “[t]he guns in the statutory interpretation wars are now largely silent.”¹¹⁸ Another commentator, writing in 2006, panned continued critiques of purposivism as mere straw-man arguments: “Textualists have been so successful discrediting strong purposivism . . . that they no longer can identify, let alone conquer, any remaining

structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.”).

112. *State ex rel. Schmidt v. Kelly*, 441 P.3d 67, 73 (Kan. 2019) (internal citation omitted).

113. *Rockies Express Pipeline, L.L.C.*, 150 N.E.3d at 898–99 (Ohio 2020).

114. *Lamar Cent. Outdoor, L.L.C. v. Div. of Hearings & Appeals*, 936 N.W.2d 573, 585 n.19 (Wis. 2019).

115. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1513 (1998) (acknowledging textualism “is increasingly popular in the state courts”).

116. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113–14 (2011) (noting the Supreme Court generally embraced purposivism “until the last decade of the twentieth century”).

117. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

118. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010).

territory between textualism's adherents and nonadherents."¹¹⁹ It was not until 2015, however, that Justice Kagan effectively confirmed purposivism's demise when she declared, "[w]e're all textualists now."¹²⁰

Furthermore, the fact that sixteen of the seventeen states have adopted textualism as their default method of statutory interpretation is not surprising given the states' conservative political orientation. According to a recent Gallup poll, eleven of these states are "highly conservative"—meaning conservatives outnumber liberals by at least twenty percentage points¹²¹—while two are "more conservative than average."¹²² These states' embrace of textualism thus aligns with the partisan leanings of their citizenry, as textualism is closely associated with political conservatism.¹²³ And, because judges in these states must periodically run for reelection, it is not surprising that their supreme courts have come to be dominated by textualists.¹²⁴

119. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

120. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&ab_channel=HarvardLawSchool.

121. See Jeffrey M. Jones, *Conservatives Greatly Outnumber Liberals in 19 U.S. States*, GALLUP (Feb. 22, 2019), <https://news.gallup.com/poll/247016/conservatives-greatly-outnumber-liberals-states.aspx> (examining Americans' political ideology by state and classifying Arkansas, Idaho, Indiana, Kansas, Missouri, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, and Wyoming as "highly conservative").

122. See *id.* (Kentucky and Ohio); see also Jeffrey M. Jones, *Democratic States Exceed Republican States by Four in 2018*, GALLUP (Feb. 22, 2019), <https://news.gallup.com/poll/247025/democratic-states-exceed-republican-states-four-2018.aspx> (examining party affiliation by state and classifying Arkansas, Idaho, Kansas, North Dakota, South Dakota, Tennessee, and Wyoming as "solid Republican," whereas Indiana, Missouri, Montana, and Oklahoma are classified as "lean Republican").

123. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 373 (2005) (observing "today's textualists tend to be politically conservative"); see also George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1347 (1990) (noting that between 1970 and 1990, textualism "increasingly assumed conservative hues").

124. See generally *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUSTICE, <http://judicialselectionmap.brennancenter.org/?court=supreme> (last visited July 22, 2020) (identifying processes by which state supreme court judges are selected, with all seventeen states under consideration requiring supreme court judges to run for election in some manner).

Whereas interpreting state fair employment statutes to protect LGBTQ workers might be perceived as advancing a liberal policy goal likely to trigger backlash from these states' conservative voters, "[d]eciding an issue in tune with federal law allows state courts to shift responsibility to . . . the U.S. Supreme Court." Dodson, *supra* note 25, at 740. As noted by Professor Dodson, "even when the Supreme Court does not reflect public opinion—or at least the public opinion of a particular state court's state—the Supreme Court commands a level of gravitas that seems to generate an

Consequently, sixteen of the seventeen states under consideration are likely to find *Bostock v. Clayton County* at least somewhat persuasive given the opinion's exclusive reliance on textualism.¹²⁵ Indeed, Justice Gorsuch begins the majority opinion with a recitation of textualism's core principles:

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.¹²⁶

The majority then proceeded to consider what the terms "sex" and "discriminate" would have meant to a reasonable person in 1964.¹²⁷ After determining that "these cases involve no more than the straightforward application of legal terms with plain and settled meanings,"¹²⁸ Justice Gorsuch faulted the employers for invoking extratextual considerations such as Congress' purpose in enacting Title VII or lawmakers' expectations about how the statute would operate: "[N]one of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is."¹²⁹

expectation of following absent compelling reasons for deviation." *Id.* at 741. Dodson suggests "it is far easier for a state judge to tell voters that her opinion follows the reasoning of the Supreme Court than to try to explain why she diverged." *Id.*; see also Long, *supra* note 22, at 479 ("[A] state judge . . . may hesitate to announce to the world that a majority of the country's highest court got the issue wrong . . .").

125. Significantly, textualism may be these states' only option when it comes to interpreting their fair employment statutes. Because "most states swiftly and successfully enacted laws substantially mirroring Title VII's provisions," these states' legislatures may have "record[ed] less debate, perform[ed] less independent factfinding, and produce[d] less legislative and rulemaking history" in adopting their fair employment statutes, preferring instead to rely on the "rigorous and detailed work of Congress" in enacting Title VII. Dodson, *supra* note 25, at 720, 730. Thus, many of these states may lack any interpretive tools beyond the statutory text such that they could not engage in purposivism even if they wanted to. Such analysis, however, is beyond the scope of this Article.

126. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

127. *Id.* at 1739–40.

128. *Id.* at 1743.

129. *Id.* at 1745; see also Brief for Petitioner at 1, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) ("Although *amici* have otherwise diverse views, they agree that a textualist analysis compels the conclusion that" LGBTQ discrimination is a form of sex discrimination so as to be actionable under Title VII).

Conversely, had the Supreme Court predicated its holding on either the sex-stereotypes or associational-discrimination rationale, these states presumably would have found *Bostock* inapposite and declined to interpret their fair employment statutes in a manner protective of LGBTQ persons.¹³⁰ Specifically, a ruling premised on the sex-stereotypes rationale likely would have been perceived by textualists as “craft[ing] a new, status-based class of protection that . . . undercut[s] the relationship between the doctrine of gender nonconformity and the classes enumerated in Title VII.”¹³¹ Adherents of this view would assert that *Price Waterhouse v. Hopkins* did not purport to create “an independent cause of action for sex stereotyping divorce[d] . . . from Title VII’s text¹³² but instead simply acknowledged that sex-based stereotypes can “be evidence that gender played a part” in a particular employment decision.”¹³³ *Price Waterhouse* provides ample support for this position, emphasizing that a plaintiff relying on sex-stereotyping evidence still “must show that the employer actually relied on her gender in making its decision” to have a cognizable claim under Title VII.¹³⁴ Accordingly, had *Bostock* held that LGBTQ “discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination”¹³⁵ so as to be actionable per se under Title VII, states practicing textualism presumably would have accused the Court of prioritizing Title VII’s purpose and the Court’s own policy goals at the expense of the statutory text.

Similarly, if the Supreme Court had relied on the associational-discrimination rationale to hold that sexual orientation discrimination is sex discrimination,¹³⁶ textualists likely would have observed that

130. Alaska would have been the sole exception as the Alaska Supreme Court takes a holistic/purposivist approach to statutory interpretation. *See Cora G. v. Dep’t of Health & Soc. Servs.*, 461 P.3d 1265, 1277 (Alaska 2020) (“When determining a statute’s meaning, we consider three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute.”).

131. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring).

132. Brief for the Petitioner, R.G. & G.R. Harris Funeral Homes at 33, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No. 18-107), 2019 WL 3958416 [hereinafter *Harris Funeral Homes Brief*].

133. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (emphasis in original).

134. *Id.*; *see also* *Harris Funeral Homes Brief*, *supra* note 132, at 33 (observing “the statute forbids discrimination ‘because of sex,’ not ‘because of sex stereotypes,’” such that “it is not enough to prove sex stereotyping; an employee must [actually] prove disparate treatment” on the basis of sex).

135. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 122 (2d Cir. 2018).

136. The Supreme Court did not consider the associational-discrimination rationale in the gender identity context. *See R.G. & G.R. Harris Funeral Homes v. Equal Emp’t Opportunity Comm’n*, 139 S. Ct. 1599 (2019) (No. 18-107) (limiting grant of certio-

while Caucasian persons who are discriminated against for being romantically involved with a Black person undoubtedly suffer race discrimination, a homosexual or bisexual person discriminated against for being romantically involved with a person of the same sex does not indisputably suffer sex discrimination.¹³⁷ In the former scenario, plaintiffs are “discriminated against because the employer was biased . . . against members of the race with whom the plaintiffs associated,” i.e., African Americans, whereas “[d]iscrimination against gay men . . . plainly is not rooted in animus toward protected third persons with whom they associate,” i.e., men.¹³⁸ Furthermore, because “context is everything” for a textualist,¹³⁹ the relevant state supreme courts presumably would have emphasized that “[i]t would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake” in cases of associational race discrimination, “and why such allegations unmistakably state a claim of discrimination against an individual employee on the basis of race,”¹⁴⁰ whereas “[n]o one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex.”¹⁴¹ Accordingly, had *Bostock* relied exclusively on the associational-discrimination rationale, states embracing textualism presumably would have held that while the elimination of LGBTQ-related bias may be a worthy objective, “such purpose cannot warrant extending the categories of discrimination that Congress has outlawed.”¹⁴²

Thus, the fact that sixteen of the seventeen states under consideration utilize textualism as their default method of statutory interpretation suggests they are likely to find *Bostock* at least somewhat persuasive given the decision’s exclusively textualist underpinnings. Whether these states will actually adopt *Bostock*’s holding remains an open question, however—one that can only be answered via a detailed examination of each state’s fair employment statute.

C. State Fair Employment Statutes

Although many states’ fair employment statutes were modeled after or are otherwise similar to Title VII, none of them are identical to

rari to “[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping”).

137. *Zarda*, 883 F.3d at 160 (Lynch, J., dissenting).

138. *Id.*

139. Scalia, *supra* note 111, at 37.

140. *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting).

141. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 368 (7th Cir. 2017) (Sykes, J., dissenting).

142. *Zarda*, 883 F.3d at 161 n.32 (Lynch, J., dissenting).

Title VII in all material respects. Courts, therefore, will have to conduct an independent examination of their state's fair employment statute to determine whether the unique provisions contained therein mandate an outcome consistent with or divergent from the Supreme Court's interpretation of Title VII. As discussed below, such an analysis would necessarily entail a review of any statements of purpose or construction as well as any statutorily-prescribed definition of "sex" so that a court may gauge how narrowly or broadly the statute is to be construed and whether the term "sex" is capable of bearing an LGBTQ-inclusive construction. A court would next need to consider any explicit references to federal employment law—either in the text itself or in precedent construing the text—to determine whether parallel construction is required, encouraged, or merely permitted. The last and most important step would be to conduct a word-by-word comparison of the "unlawful employment practices" provisions to determine if the state's fair employment statute contains the same "key statutory terms" found in Title VII and on which the Supreme Court predicated its holding in *Bostock*. This section conducts the requisite analysis with the aid of data contained in the Appendix.

i. Interpretive Mandates

Of the seventeen states under consideration, five stipulate that their fair employment statutes are to be construed liberally: Kansas, Ohio, Pennsylvania, South Dakota, and Wisconsin. Pennsylvania, for example, prefaces its statute by noting that "[t]he provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply."¹⁴³ Far from being mere guidelines that courts are free to consider and reject, these interpretive mandates often assume dispositive significance, particularly in close cases.¹⁴⁴ Thus, these five states are presumably more likely to adopt *Bostock* than states without such provisions, as their legislatures have made clear the statutes are to be broadly construed.

143. 43 PA. STAT. AND CONS. STAT. ANN. § 962(a) (West 2020); *see also* KAN. STAT. ANN. § 44-1006(a) (West 2020); OHIO REV. CODE ANN. § 4112.08 (West 2021); S.D. CODIFIED LAWS § 20-13-54 (West, 2020); WIS. STAT. ANN. § 111.31(3) (West 2019).

144. *See, e.g.*, *Dworning v. Euclid*, 119 Ohio St. 3d 83 (2008) ("We will not permit a rule of judicial convenience to frustrate R.C. Chapter 4112's goals of eliminating discrimination and providing redress to its victims. R.C. 4112.08 forbids such a result.").

ii. Definitions of “Sex”

Seven of the states include a statutorily-prescribed definition of “sex” in their fair employment statutes, with Arkansas, Kentucky, Michigan, Ohio, and Oklahoma having definitions similar or virtually identical to the definition found in Title VII and construed by the Supreme Court in *Bostock*.¹⁴⁵ Additionally, whereas North Dakota’s definition could be given a narrow construction whereby only “pregnancy, childbirth, and disabilities related to pregnancy or childbirth” constitute sex discrimination,¹⁴⁶ North Dakota courts have construed the term broadly so as to be more or less consistent with Title VII.¹⁴⁷ Thus, there is nothing in these six states’ definitions of “sex” that would preclude their supreme courts from following *Bostock*.

The same is likely true for Tennessee, although courts in that state may be hesitant to adopt *Bostock* given the legislature’s antipathy toward LGBTQ civil rights.¹⁴⁸ For example, shortly after Nashville’s adoption of an LGBTQ-inclusive nondiscrimination ordinance in 2011, the Tennessee General Assembly passed a law restricting municipalities’ ability to protect LGBTQ persons.¹⁴⁹ The law also amended Tennessee’s fair employment statute to define “sex” as “mean[ing] and refer[ring] only to the designation of an individual person as male or female as indicated on the individual’s birth certificate.”¹⁵⁰

Although ostensibly designed to preclude protections for LGBTQ persons, this narrow, biologically-based definition of sex is entirely consistent with the majority’s ruling in *Bostock*. At the outset of his

145. Compare 42 U.S.C. § 2000e(k) (2018), with ARK. CODE ANN. § 16-123-102(1) (West 2020) (defining “gender” similarly to Title VII’s definition of “sex”), KY. REV. STAT. ANN. § 344.030(8) (West 2020), MICH. COMP. LAWS ANN. § 37.2201(d) (West 2020), OHIO REV. CODE ANN. § 4112.01(B) (West 2020), and OKLA. STAT. ANN. tit. 25, § 1301(6) (West 2020).

146. See N.D. CENT. CODE § 14-02.4-02 (West 2020) (omitting the phrase “but is not limited to” from “‘sex’ includes pregnancy, childbirth, and disabilities related to pregnancy or childbirth”).

147. See *Opp v. Source One Mgmt.*, 591 N.W.2d 101, 105–06 (N.D. 1999) (relying on the Supreme Court’s interpretation of Title VII to hold that sexual harassment claims are actionable under the North Dakota Human Rights Act).

148. See Hope Jackson, *Tennessee’s Slate of Hate Continues with More Anti-LGBTQ Bills to Fight*, HUM. RTS. CAMPAIGN, Feb. 24, 2020, <https://www.hrc.org/news/tennessees-slate-of-hate-continues-with-more-anti-lgbtq-bills-to-fight> (“Each year, Tennessee is at the top of the list of states introducing the most anti-LGBTQ legislation – and this year is no different.”).

149. See generally Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C. R. & C. L. 153 (2013) (providing a detailed history of the law).

150. TENN. CODE ANN. § 4-21-102 (West 2020).

opinion, Justice Gorsuch acknowledged that the Court was “proceed[ing] on the assumption that ‘sex’ signified . . . only . . . biological distinctions between male and female.”¹⁵¹ Even under this relatively restrictive definition, however, the Court held that LGBTQ discrimination is sex discrimination for the purposes of Title VII.

Hence, while purposivists might be inclined to construe Tennessee’s fair employment statute narrowly given the legislature’s aversion to LGBTQ civil rights generally and its adoption of a biologically-based definition of sex specifically, the textualists on the Tennessee Supreme Court theoretically should not be swayed by such facts.¹⁵² If anything, the 2011 amendments should be found to weigh in favor of protection for LGBTQ persons given the similarities between the statute and Justice Gorsuch’s analysis in *Bostock*.

iii. *References to Federal Law*

Three states—Idaho, Kentucky, and Tennessee—explicitly aver that their fair employment statutes are designed to effectuate federal civil rights laws, including the Civil Rights Act of 1964. Idaho, for example, describes its statute’s purpose as “provid[ing] for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967, as amended, and Titles I and III of the Americans with Disabilities Act.”¹⁵³ While supreme courts in two of the states construe these provisions as “allow[ing] our state courts to look to federal law for [interpretive] guidance,”¹⁵⁴ the third state seemingly construes its statute to require lockstep uniformity with federal law—at least when the texts are consistent.¹⁵⁵ These three states are not the only

151. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

152. Because Tennessee Supreme Court justices must periodically run to retain their seats, however, these individuals’ otherwise steadfast commitment to textualism may at times yield to the pragmatic reality of politics. Cf. Brian Haas, *Tennesseans Vote to Retain Supreme Court Justices*, TENNESSEAN (Aug. 7, 2014, 9:14 PM), <https://www.tennessean.com/story/news/politics/2014/08/07/tennesseans-vote-retain-supreme-court-justices/13756359> (noting three incumbent justices “were able to overcome a vigorous opposition campaign” that accused them of being “liberal,” “soft on crime,” and pro-Obamacare).

153. IDAHO CODE ANN. § 67-5901(1) (West 2020); see also KY. REV. STAT. ANN. § 344.020(1)(a) (West 2020); TENN. CODE ANN. § 4-21-101(a)(1) (West 2020).

154. *Frogley v. Meridian Joint Sch. Dist. No. 2*, 155 Idaho 558 (2013); see also *Phillips v. Interstate Hotels Corp. No. # L07*, 974 S.W.2d 680, 684 (Tenn. 1998).

155. *Compare Bank One v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001) (“This Court interprets KRS 344.040 in consonance with federal anti-discrimination law.”), with *Walker v. Commonwealth*, 503 S.W.3d 165, 174 (Ky. 2016) (“Finally, and perhaps most crucially, the provision in federal law upon which the mixed-motive analysis is

jurisdictions to look to federal law for guidance when interpreting their fair employment statutes, however.¹⁵⁶

As reflected in the Appendix, each of the seventeen states under consideration has expressed a willingness to consult federal antidiscrimination law when construing analogous provisions of their fair employment statutes.¹⁵⁷ State supreme courts often justify this practice by observing that their fair employment statutes are modeled after or otherwise similar to Title VII, even if that fact is not explicitly acknowledged in the statutory text.¹⁵⁸ Recently, however, scholars have cast doubt on the continued accuracy of such statements, with Professor Sandra Sperino emerging as one of the harshest critics of state courts' enduring commitment to parallel construction.

Professor Sperino faults state courts for continuing to construe fair employment statutes in tandem with federal law despite increasing divergence in the statutory texts. While conceding that states' use of "federal law as persuasive authority is not problematic in itself" provided "due regard [is given] to the specific goals, history, and text of the underlying state statute," Professor Sperino contends that "[o]n too many occasions . . . courts have treated interpretations of federal discrimination law as if they should be presumptively applied to state law claims" without first considering whether parallel construction is appropriate.¹⁵⁹ In particular, she observes that in endeavoring to maintain consistency between state and federal law, state courts frequently rely on inapt or outdated precedent that fails to consider meaningful differences in the relevant texts:

[F]ederal frameworks often are imported into state law with little explicit consideration of the state statutory regime, as courts tend to borrow deference language that has been developed over time in regards to other statutory provisions. In many instances, a prior court has looked to federal law to decide a narrow question of state discrimination law. When the court looks to federal law, it uses broad language regarding the similarity between federal and state law and the reasons why state law should follow federal law. Later courts [then] begin relying on the earlier rationale, failing to recog-

based has no equivalent in the KCRA. For these reasons . . . we elect not to employ a 'mixed-motive' analysis.").

156. Significantly, the Supreme Court of Alaska has "repeatedly articulated that" the Alaska Human Rights Act—while modeled on federal law—"is intended to be more broadly interpreted than federal law." *Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004).

157. *See infra* Appendix.

158. *See infra* Appendix.

159. Sperino, *supra* note 23, at 565.

nize that the rationale of the first case may not apply when the court is considering a different statutory provision¹⁶⁰

Professor Sperino acknowledges that state courts' preference for parallel construction "may not have been as problematic [in the past] as it is today" given that "[m]any of the provisions that drew the courts' early attention were provisions that were the same in both federal and state law."¹⁶¹ She notes that in 1991, however, Congress passed a law amending Title VII that most states failed to replicate, creating significant disparities in the statutory texts.¹⁶² This, in turn, has led federal courts to interpret Title VII in a manner that would seem to be incompatible with state fair employment statutes yet is still routinely embraced by state courts.¹⁶³ Professor Sperino, therefore, encourages state courts to acknowledge that parallel construction may no longer be possible or even desirable and instead begin construing fair employment statutes independently of federal law.¹⁶⁴

Whereas these critiques are entirely apt in the context of employment nondiscrimination law generally, they are immaterial for the purposes of the present analysis. *Bostock* is not predicated on any of the 1991 amendments to Title VII.¹⁶⁵ Rather, in holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,"¹⁶⁶ the Supreme Court relied on the statute's text as originally enacted in

160. *Id.* at 565–66.

161. *Id.* at 568.

162. *See id.* (referencing Civil Rights Act of 1991).

163. *Id.* at 571.

164. *Id.* at 588–89.

165. Although the Court acknowledged that "Congress . . . supplement[ed] Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice," the majority did not actually rely on the test: "[B]ecause nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020).

Even so, at least eight of the seventeen states under consideration have adopted the motivating factor test. *See* *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 839, 842 (Alaska 2010); *Greenlee v. J.B. Hunt Transp. Servs.*, 342 S.W.3d 274, 277–78 (Ark. 2009); *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 n.2, 846 n.7 (Ind. 2009); *Wagher v. Guy's Foods*, 885 P.2d 1197, 1214 (Kan. 1994); *Sniecinski v. Blue Cross & Blue Shield of Mich.*, 666 N.W.2d 186, 192–93 n.6 (Mich. 2003); *Laudert v. Richland Cnty. Sheriff's Dep't*, 7 P.3d 386, 391–92 (Mont. 2000); *Wholf v. Tremco Inc.*, 26 N.E.3d 902, 910–12 (Ohio Ct. App. 2015); *Kraemer v. Labor & Indus. Review Comm'n*, N.W.2d 904 (Wis. Ct. App. 2014). *Contra* *Walker v. Commonwealth*, 503 S.W.3d 165, 173–74 (Ky. Ct. App. 2016).

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

1964.¹⁶⁷ The majority, moreover, repeatedly emphasized that Title VII's terms must be given their "ordinary public meaning" as of 1964, "the time of the statute's adoption."¹⁶⁸ Consequently, where a state supreme court has previously expressed a willingness to consult federal antidiscrimination law on the grounds its state fair employment statute is modeled after or otherwise similar to Title VII, the court may conceivably consider and adopt *Bostock* without impugning its credibility.

iv. *Comparison of "Unlawful Employment Practices" Provisions*

A review of the relevant statutory provisions confirms that many states' fair employment statutes do, indeed, track Title VII.¹⁶⁹ Of the seventeen states under consideration, five have "unlawful employment practices" provisions virtually identical to Title VII—both in terms of substance and formatting¹⁷⁰—while five others have provisions that

167. Compare 42 U.S.C. § 2000e-2(a) (2018), with Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (same).

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

169. While many of the statutes are comprehensive in that they include every prohibited basis for discrimination in a single, unified statute, federal antidiscrimination law is splintered among three major acts: the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967, prohibiting discrimination against persons forty years of age and older; and the Americans with Disabilities Act of 1990, prohibiting discrimination on the basis of disability. *Laws Enforced by EEOC, EQUAL EMPLOYMENT OPPORTUNITY COMM'N*, <https://www.eeoc.gov/statutes/laws-enforced-eeoc> (last visited Aug. 2, 2020).

For federal cases, the existence of three separate statutory regimes has given rise to varying causation standards, with claims of status-based discrimination under Title VII eligible for either a but-for or motivating factor standard while Title VII retaliation claims and ADEA claims remain subject to a but-for causation standard. Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 611 n.538 (2013). The appropriate standard for ADA claims, meanwhile, is an open question. See *Murray v. Mayo Clinic*, 934 F.3d 1101, 1103–07 (9th Cir. 2019) (acknowledging that whereas a plurality of circuits once applied a motivating factor standard to ADA claims, circuits having an opportunity to consider intervening Supreme Court precedent have instead utilized a but-for causation standard).

Consequently, fair employment statutes' inclusion of "age" and "disability" alongside "race," "color," "religion," "sex," and "national origin" has led to considerable uncertainty regarding the appropriate causation standard for discrimination claims arising under state law. Koai, *supra* note 71, at 778–85. Nevertheless, the causation conundrum plaguing state courts is irrelevant for the purposes of this Article, as *Bostock* did not rely on the "more forgiving" motivating factor standard of causation but instead applied the "more traditional" but-for standard. *Bostock*, 140 S. Ct. at 1740. The fact a state has enacted a comprehensive fair employment statute therefore has no bearing on whether the statute's specific prohibition against sex discrimination should be construed to protect LGBTQ persons.

170. See *infra* Appendix (Kentucky, Michigan, Missouri, Oklahoma, and Tennessee).

are substantively similar to Title VII.¹⁷¹ Conversely, the statutes of the seven remaining states differ, sometimes markedly, from Title VII.¹⁷² Nonetheless, the latter statutes all contain the same terms that were afforded near-dispositive significance in *Bostock*.¹⁷³

Indeed, the terms “sex,” “because of,” “discriminate,” and “individual” appear in all seventeen states’ fair employment statutes.¹⁷⁴ Each of these terms featured prominently in *Bostock*, where Justice Gorsuch described the Court’s interpretive task as follows:

We must determine the ordinary public meaning of Title VII’s command that it is “unlawful for an employer to fail or refuse to hire or 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.” To do so, we orient ourselves to the time of the statute’s adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court’s precedents.¹⁷⁵

The first “key statutory term” to be addressed by the Court was the word “sex.”¹⁷⁶ Justice Gorsuch began by noting that “[t]he only statutorily protected characteristic at issue in today’s cases is ‘sex’—and that is also the primary term in Title VII whose meaning the parties dispute.”¹⁷⁷ Whereas the employers argued that in 1964 the term “sex” was understood to refer to “status as either male or female as determined by reproductive biology,” the employees countered that, “even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation.”¹⁷⁸ Declining to answer the question directly, Justice Gorsuch observed that “because nothing in our approach to

171. *See infra* Appendix (Idaho, Kansas, Montana, Ohio, and Wyoming).

172. *See infra* Appendix (Alaska, Arkansas, Indiana, North Dakota, Pennsylvania, South Dakota, and Wisconsin).

173. *See infra* at 568–70. Each of these states, moreover, has expressed a willingness to consult federal antidiscrimination law when construing analogous provisions of their fair employment statutes. *See infra* Appendix.

174. *See infra* notes 176, 180, 184, 188 and accompanying text.

175. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738–39 (2020).

176. Although Arkansas uses the term “gender” rather than “sex,” neither the legislature nor the courts seem to view this as a meaningful distinction. *See* ARK. CODE ANN. § 16-123-102(1) (West 2020) (defining “gender” similar to Title VII’s definition of “sex”); *see also* *Island v. Buena Vista Resort*, 103 S.W.3d 671, 675–77 (Ark. 2003) (relying on Title VII caselaw interpreting “sex” to hold that sexual harassment is actionable as a form of “gender” discrimination).

177. *Bostock*, 140 S. Ct. at 1739.

178. *Id.*

these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."¹⁷⁹

The Court next examined the phrase "because of," noting "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"¹⁸⁰ Justice Gorsuch explained that "[i]n the language of law, this means that Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation," which is established "whenever a particular outcome would not have happened 'but for' the purported cause."¹⁸¹ While conceding this can be a sweeping standard, he noted the statute "does not concern itself with everything that happens 'because of' sex" such that employers are only liable "when they 'fail or refuse to hire,' 'discharge,' 'or otherwise discriminate against' someone because of a statutorily protected characteristic like sex."¹⁸² Because the employers then "assert[ed] that the statute's list of verbs is qualified by the" phrase "otherwise . . . discriminate against," the Court proceeded to consider the meaning of "discriminate."¹⁸³

After determining that "discriminate"¹⁸⁴ meant the same thing in 1964 as it does today—"[t]o make a difference in treatment or favor (of one as compared with others)"—Justice Gorsuch reasoned that in the context of Title VII the term "would seem to mean treating [an] individual worse than others who are similarly situated."¹⁸⁵ In doing so, he rejected a competing interpretation that would have focused on an "employer's treatment of groups rather than individuals."¹⁸⁶ While noting the latter interpretation held "some intuitive appeal," Justice Gorsuch found it was foreclosed by the statutory text, which "tells us

179. *Id.*

180. *Id.* Thus, the fact that Indiana uses "by reason of" rather than "because of" is ostensibly of no consequence. *See infra* Appendix; *see also* IND. CODE ANN. § 22-9-1-3(1) (West 2020) (defining "discriminatory practice" as "the exclusion of a person from equal opportunities because of" various characteristics).

181. *Bostock*, 140 S. Ct. at 1739.

182. *Id.* at 1740.

183. *Id.*

184. One state uses the term "discrimination" rather than "discriminate," *see infra* Appendix (Arkansas), while three other states use the term "discriminatory." *See id.* (Indiana, North Dakota, and South Dakota).

These variations are presumably irrelevant for the purposes of Justice Gorsuch's analysis, however, as the three words are merely different parts of speech, i.e., "discriminate" is a verb, "discriminatory" an adjective, and "discrimination" a noun.

185. *Bostock*, 140 S. Ct. at 1740.

186. *Id.*

three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals, not groups.”¹⁸⁷

Accordingly, the final term to be examined by the Court was “individual.”¹⁸⁸ Like the other terms, “individual” was found to have the same meaning in 1964 as it does today: “A particular being as distinguished from a class, species, or collection.”¹⁸⁹ Justice Gorsuch was careful to note that “[t]he consequences of the law’s focus on individuals rather than groups are anything but academic.”¹⁹⁰ Indeed, it was necessarily fatal to the employers’ argument that in discriminating against all LGBTQ persons equally, they were not discriminating against men or women as a group and therefore could not be liable under Title VII.¹⁹¹

Although the Court then proceeded to confirm its findings against prior precedent,¹⁹² *Bostock*’s analysis begins and ends with the statutory text. Justice Gorsuch, ever the textualist,¹⁹³ conceded as much when he declared, “[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”¹⁹⁴

Thus, given their highly influential if not dispositive role in *Bostock*, the fact “sex,” “because of,” “discriminate,” and “individual” appear in all seventeen states’ fair employment statutes suggests that these jurisdictions would be justified in construing their state’s sex discrimination ban to protect LGBTQ persons.

D. Findings & Implications

Bostock has left many LGBTQ persons in legal limbo: unable to invoke the LGBTQ-inclusive protections conferred by Title VII be-

187. *Id.*

188. Eight states use the term “person” rather than “individual,” *see infra* Appendix (Alaska, Arkansas, Indiana, Kansas, Montana, Ohio, South Dakota, and Wyoming), while two states utilize both terms. *See id.* (Idaho and Tennessee).

This distinction is ostensibly irrelevant for the purposes of Justice Gorsuch’s analysis, however, as he uses the terms “individual” and “person” interchangeably. *Bostock*, 140 S. Ct. at 1740–41; *see also* *Person*, WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/person> (last visited Aug. 4, 2020) (defining the term “person” as “human, individual”).

189. *Bostock*, 140 S. Ct. at 1740.

190. *Id.* at 1741.

191. *Id.*

192. *Id.* at 1743–44.

193. *See* Editorial, *The Supreme Court’s Textualism Test*, WALL ST. J. (Nov. 21, 2019, 7:21 PM), <https://www.wsj.com/articles/the-supreme-courts-textualism-test-11574382080> (asserting Justice Gorsuch “has taken on the role of public evangelist for the Scalia method” of statutory interpretation).

194. *Bostock*, 140 S. Ct. at 1743.

cause they work at a small firm and without a cognizable claim under state law because “sexual orientation” and “gender identity” are not included among the jurisdiction’s protected categories.¹⁹⁵ In theory, this disparity could be resolved legislatively, either by Congress or the relevant state legislatures. However, a statutory approach would almost certainly fail given the inherent difficulty of passing legislation even in the most bipartisan of times,¹⁹⁶ to say nothing of the current unprecedented polarization of American politics.¹⁹⁷ Thus, if persons working at small firms in states without explicit LGBTQ employment protections are to secure equal opportunity in the workplace, it will have to come through state courts’ application of state law.

For the vast majority of these individuals, the prospect of workplace equality is not only possible but indeed probable. Of the seventeen states under consideration, two—Kentucky and Tennessee—appear *highly likely* to follow *Bostock* given that: their fair employment statutes are effectively identical to Title VII and contain the same “key statutory terms” as Title VII;¹⁹⁸ their legislatures’ purpose in enacting a fair employment statute was to provide for the execution of federal civil rights laws within the state;¹⁹⁹ and their supreme courts’ preferred method of statutory interpretation is textualism.²⁰⁰

Separately, twelve states—Alaska, Idaho, Kansas, Michigan, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, South Dakota, Wisconsin, and Wyoming—are *likely* to follow *Bostock* given that: many of their fair employment statutes are effectively identical with or at least substantively similar to Title VII and contain the same “key statutory terms” as Title VII;²⁰¹ their supreme courts’ preferred method of statutory interpretation is textualism (with the exception of Alaska);²⁰² and their legislatures—at least in seven states—have mandated that fair employment statutes are to be liberally construed or

195. *See supra* at 539.

196. *See Stearns, supra* note 15, at 1272 (“In Congress, as in many state legislatures, numerous negative legislative checkpoints render passage of proposed legislation difficult by design.”).

197. *See Pildes, supra* note 16, at 276 (“We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.”).

198. *See infra* Appendix.

199. *See supra* note 153.

200. *See supra* note 108.

201. *See infra* Appendix.

202. *See supra* note 108.

otherwise acknowledged that the statutes are intended to effectuate federal civil rights laws within the state.²⁰³

Finally, three states—Arkansas, Indiana, and North Dakota—seemingly would be justified in following *Bostock* but may decline to do so given that the only parallels between their fair employment statutes and Title VII are that they contain the same “key statutory terms.”²⁰⁴ Notwithstanding their textualist bona fides,²⁰⁵ these states’ supreme courts may find *Bostock* inapposite due to the significant disparities in the statutory texts.

Deference to federal law appears particularly apt in this context given the various policy concerns discussed in Part I.A. For example, whereas state courts might normally be concerned about the potential for backlash should they issue unpopular or controversial rulings, the matter of employment protections for LGBTQ persons is neither unpopular nor contentious. Even before the Supreme Court’s ruling, 71% of Americans were in favor of banning LGBTQ-related employment discrimination,²⁰⁶ and that number has increased to approximately 90% post-*Bostock*.²⁰⁷ Likewise, while conserving scarce resources may always be cited in support of states’ emulating federal law, it is seemingly at its zenith in *Bostock*: Why should states incur the time and expense to revisit an issue that has already been addressed by nine Supreme Court justices in a detailed, 172-page opinion drafted over the span of eight months and addressing the litany of arguments raised by some of the nation’s most respected advocates as informed by more than sixty amicus briefs? At this point, it seems highly unlikely a state court would discover some seminal precedent that has, to date, escaped detection or expose some fatal flaw in the majority’s reasoning that was overlooked by Justices Alito and Kavanaugh’s dissents. Furthermore, given that each of the relevant statutes contains the same

203. See *supra* notes 143 (Kansas, Ohio, Pennsylvania, South Dakota, and Wisconsin) and 153 (Idaho). Cf. *Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004) (observing the Alaska Supreme Court has “repeatedly” held that its fair employment statute “is intended to be more broadly interpreted than federal law”).

204. See *infra* Appendix.

205. See *supra* note 108.

206. Daniel Cox et al., *Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America*, PUB. RELIGION RSCH. INST. (Aug. 2, 2018), <https://www.pri.org/research/wedding-cakes-same-sex-lgbt-marriage/>.

207. *Poll: Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual and Transgender People by Employers and Health Care Providers*, KAISER FAMILY FOUND. (June 24, 2020), <https://www.kff.org/other/press-release/poll-large-majorities-including-republicans-oppose-discrimination-against-lesbian-gay-bisexual-and-transgender-people-by-employers-and-health-care-providers/>.

“key statutory terms” as Title VII, any state court declining to follow *Bostock* would be vulnerable to accusations of judicial activism and results-oriented judging, thereby calling into question the court’s credibility and status as an apolitical institution.

Conversely, the policy justifications for state independence from federal law discussed in Part I.B. are largely unpersuasive as applied to *Bostock*. First, rather than reaffirming their status as distinct governing entities within the federalist system, states’ rejection of *Bostock* stands to undermine their perceived legitimacy given that they are likely to be seen as less responsive and less effective in combatting employment discrimination relative to the federal government. Second, whereas routine, uncritical following of federal law may threaten to demote states from sovereigns to subjects, these states’ adoption of *Bostock* would be neither routine nor uncritical. Such decisions would instead be predicated on consideration of numerous factors, including the states’ preferred method of statutory interpretation, the existence of any interpretive mandates or policies regarding parallel construction, and the presence of the same “key statutory terms” found in Title VII and on which the Supreme Court predicated its holding in *Bostock*. Third, because these rulings would not stem from a mechanical, unthinking application of federal law but would instead be predicated upon the unique legal landscape of each jurisdiction, the risk that states adopting *Bostock* would be seen as mere agents of a smarter, more competent federal judiciary stands to be minimal if not nonexistent.

IV.

CONCLUSION

Bostock v. Clayton County is already having a major impact on federal law beyond Title VII. After observing “*Bostock* has great import for . . . Title IX claim[s],” the Eleventh Circuit recently held that transgender students must be allowed to use restrooms consistent with their gender identity.²⁰⁸ Ten days later, the Eastern District of New York enjoined two rules proposed by the Department of Health and Human Services that would have restricted transgender persons’ access to healthcare, deeming the rules “contrary to the Supreme Court’s pronouncement in *Bostock*.”²⁰⁹ That same day, the District of Idaho—relying in part on *Bostock*—enjoined a state law that would have pre-

208. *Adams v. Sch. Bd. of St. Johns Cnty.*, No. 18-13592, 2020 WL 4561817, at *11 (11th Cir. Aug. 7, 2020).

209. *Walker v. Azar*, No. 20-CV-2834(FB)(SMG), 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020).

cluded transgender female athletes from participating on women's sports teams.²¹⁰

Whether and to what extent *Bostock* will impact state law remains an open question. To date, the Court of Appeals of Ohio is one of only two state appellate courts in the country to address a claim of LGBTQ employment discrimination post-*Bostock*. After noting that “federal case law is generally applicable to cases involving alleged violations of” Ohio’s fair employment statute, the Court of Appeals conceded that a claim of sexual orientation discrimination “could potentially have a basis in law under *Bostock*.”²¹¹ The court did not decide whether such claims are actually cognizable under Ohio law, however, holding “even if there is now a legal basis for this type of claim under Ohio law,” the plaintiff “has not alleged facts that suggest that she suffered adverse employment action because of her sexual orientation.”²¹² Hence, a comprehensive examination of each state’s fair employment statute, as informed by relevant caselaw, is necessary to gauge *Bostock*’s potential persuasiveness to any given jurisdiction.

This Article examined a subset of the twenty-eight states lacking explicit, LGBTQ-based employment protections and demonstrated that, to varying degrees, all seventeen states would be justified in construing their statutes’ existing bans on sex discrimination to protect LGBTQ workers. Although the legislators who wrote and adopted these statutes “might not have anticipated their work would lead to” protections for LGBTQ persons, “the limits of the drafters’ imagination [presumably] supply no reason to ignore the law’s demands.”²¹³

210. *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 WL 4760138, at *39 (D. Idaho Aug. 17, 2020).

211. *Nance v. Lima Auto Mall, Inc.*, No. 1-19-54, 2020 WL 3412268, at *26 (Ohio Ct. App. June 22, 2020).

212. *Id. But see Tarrant Cnty. Coll. Dist. v. Sims*, No. 05-20-00351-CV, 2021 WL 911928, at *4 (Tex. App. Mar. 10, 2021) (“[W]e conclude we must follow *Bostock* and read the [Texas Commission on Human Rights Act]’s prohibition on discrimination ‘because of sex’ as prohibiting discrimination based on an individual’s status as a homosexual or transgender person.”).

213. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

APPENDIX

Alaska

- State Statutory Text

Except as provided in (c) of this section, it is unlawful for (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood; ALASKA STAT. ANN. § 18.80.220(a).

- State Supreme Court References to Title VII

The Alaska Human Rights Act, AS 18.80.220, was modeled on federal law, thus making federal case law relevant to this court's interpretation of the statute. But we have repeatedly articulated that AS 18.80.220 is intended to be more broadly interpreted than federal law to further the goal of eradicating discrimination. We therefore review an employee's claims of race discrimination in light of federal Title VII case law, mindful of "the strong statement of purpose in enacting AS 18.80 and our legislature's intent to put as many teeth into the statute as possible." *Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004).

Arkansas

- State Statutory Text

The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to: (1) The right to obtain and hold employment without discrimination; ARK. CODE ANN. § 16-123-107(a).

- State Supreme Court References to Title VII

Because we have not had an opportunity to consider this issue, and because the Arkansas Civil Rights Act instructs us to look to federal

civil-rights law when interpreting the Act, we look now to Title VII and federal cases interpreting Title VII for guidance on sexual-harassment claims brought pursuant to the Arkansas Civil Rights Act. *Island v. Buena Vista Resort*, 103 S.W.3d 671, 675–76 (Ark. 2003).

Idaho

- State Statutory Text

It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex or national origin, in any of the following subsections. . . . (1) For an employer to fail or refuse to hire, to discharge, or to otherwise discriminate against an individual with respect to compensation or the terms, conditions or privileges of employment or to reduce the wage of any employee in order to comply with this chapter; IDAHO CODE § 67-5909.

- State Supreme Court References to Title VII

We are guided in our interpretation of the Idaho statute by federal law. The first section of the Idaho Human Rights Act declares that its purpose is to “provide for the execution within the state of the policies embodied in the federal Civil Rights Act of 1964, . . . and the Age Discrimination in Employment Act of 1967. . . .” I.C. § 67-5901. This Court has previously determined that the legislative intent reflected in I.C. § 67-5901 allows our state courts to look to federal law for guidance in the interpretation of the state provisions. *O’Dell v. Basabe*, 810 P.2d 1082, 1097 (Idaho 1991).

Indiana

- State Statutory Text

(a) It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, and acquisition through purchase or rental of real property, including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, disability, national origin, or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to race, religion, color, sex, disability, national origin, or ancestry through reasonable methods is the purpose of this chapter. IND. CODE ANN. § 22-9-1-2.

- State Supreme Court References to Title VII

In construing Indiana civil rights law our courts have often looked to federal law for guidance. . . . We do so again here. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009) (identifying similarities in state and federal statutory text).

Kansas

- State Statutory Text

It shall be an unlawful employment practice: (1) For an employer, because of the race, religion, color, sex, disability, national origin or ancestry of any person to refuse to hire or employ such person to bar or discharge such person from employment or to otherwise discriminate against such person in compensation or in terms, conditions or privileges of employment; to limit, segregate, separate, classify or make any distinction in regards to employees; or to follow any employment procedure or practice which, in fact, results in discrimination, segregation or separation without a valid business necessity. KAN. STAT. ANN. § 44-1009(a).

- State Supreme Court References to Title VII

Federal court decisions concerning Title VII are not controlling on this court. They are persuasive authority, however. Especially is this true when they concern general law in the field of civil rights. . . . As previously stated, the federal court decisions concerning Title VII are not controlling but they are persuasive when one considers the comparability of the provisions of the two statutes. *Woods v. Midwest Conveyor Co.*, 648 P.2d 234, 239 (Kan. 1982) (superseded by statute).

Kentucky

- State Statutory Text

It is an unlawful practice for an employer:

(a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

(b) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

KY. REV. STAT. ANN. § 344.040(1).

- State Supreme Court References to Title VII

This Court interprets KRS 344.040 in consonance with federal anti-discrimination law. Thus, the Ellerth/Faragher affirmative defense is available to employers facing vicarious liability for sexual harassment under KRS 344.040. *Bank One, Ky., N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001).

The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act and should be interpreted consistently with federal law. *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 797–98 (Ky. 2000).

Michigan

- State Statutory Text

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

MICH. COMP. LAWS ANN. § 37.2202(1).

- State Supreme Court References to Title VII

At issue in the instant case is subsection 103(h)(iii), commonly referred to as a “hostile work environment” action. Title VII of the United States Civil Rights Act possesses an analogous action, recognized by the United States Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). In fact, the language of the Michigan Civil Rights Act strongly parallels language adopted by the Equal Employment Opportunity Commission, the agency vested by Congress to enforce [T]itle VII, defining sexual discrimination. While this Court is not compelled to follow federal precedent or guidelines in interpreting Michigan law, this Court may, “as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.” *Radtke v. Everett*, 501 N.W.2d 155, 161–62 (Mich. 1993).

Missouri

- State Statutory Text

It shall be an unlawful employment practice: (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) 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, national origin, sex, ancestry, age or disability;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability; MO. ANN. STAT. § 213.055(1).

- State Supreme Court References to Title VII

Section 213.055.1(1)(a) provides it is an unlawful employment practice “to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of . . . sex. . . .” “When reviewing cases under the Act, appellate courts are guided by both Missouri law and any federal employment discrimination (i.e., Title VII) case law that is consistent with Missouri law.” The Act “is clear that if an employer considers age, disability or other protected characteristics when making an employment decision, an employee has made a submissible case for discrimination.” *Lampley v. Mo. Comm’n on Human Rights*, 570 S.W.3d 16, 22–23 (Mo. 2019).

Montana

- State Statutory Text

It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction; MONT. CODE ANN. § 49-2-303(1).

- State Supreme Court References to Title VII

Montana law also prohibits employment discrimination based on sex. *See* § 49-2-303(1), MCA. Because the Montana Human Rights Act was closely modeled after Title VII, we have determined that “reference to federal case law is both appropriate and helpful” in construing the Montana Human Rights Act. *Stringer-Altmaier v. Haffner*, 138 P.3d 419, 422 (Mont. 2006).

North Dakota

- State Statutory Text

It is a discriminatory practice for an employer to fail or refuse to hire an individual; to discharge an employee; or to accord adverse or unequal treatment to an individual or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physi-

cal or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer. N.D. CENT. CODE § 14-02.4-03(1).

- State Supreme Court References to Title VII

The North Dakota Human Rights Act makes it unlawful for an employer to discriminate on the basis of, among other things, an employee's sex. *See* N.D.C.C. § 14-02.4-01. Title VII of the Civil Rights Act of 1964 is the federal law with obvious parallels to our state discrimination statute. While we have yet to address a sexual harassment claim under the North Dakota Human Rights Act, we will look to federal interpretations of Title VII for guidance when it is "helpful and sensible to do so[.]" . . . We similarly conclude sexual harassment is an actionable form of sex discrimination under the North Dakota Human Rights Act. *Opp v. Source One Mgmt.*, 591 N.W.2d 101, 105–06 (N.D. 1999).

Ohio

- State Statutory Text

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. OHIO REV. CODE ANN. § 4112.02.

- State Supreme Court References to Title VII

Federal case law interpreting Title VII has persuasive value in cases like this one, which involves comparable provisions in R.C. Chapter 4112. There is no material difference between R.C. 4112.01(A)(2)'s use of the phrase "person acting * * * in the interest of an employer" and Title VII's use of the phrase "agent of" an employer. . . . And, like Title VII, R.C. 4112.01(A)(2)'s definition of "employer" also excludes smaller employers, i.e., those with fewer than four employees. *Hauser v. Dayton Police Dep't*, 17 N.E.3d 554, 558–59 (Ohio 2014).

Oklahoma

- State Statutory Text

It is a discriminatory practice for an employer:

1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer; or
 2. To limit, segregate, or classify an employee or applicant for employment in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer.
- OKLA. STAT. ANN. tit. 25, § 1302(A).

- State Supreme Court References to Title VII

One of the expressed purposes of Oklahoma's anti-discrimination statute was to implement the provisions of Title VII into the State of Oklahoma. *See* 25 O.S. 1991, § 1101(a) and *Tate*, 833 P.2d at 1228. *List* teaches that we must therefore interpret Oklahoma's anti-discrimination statute together with Title VII in order to determine an employee's rights under state law. *Marshall v. OK Rental & Leasing*, 939 P.2d 1116, 1122 n.3 (Okla. 1997) (overruled on other grounds).

Pennsylvania

- State Statutory Text

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

- (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disabil-

ity or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required. 43 PA. STAT. AND CONS. STAT. ANN. § 955.

- State Supreme Court References to Title VII

Indeed, as our prior cases have suggested, the [Pennsylvania] Human Relations Act should be construed in light of “principles of fair employment law which have emerged relative to the federal (statute) [i.e., Title VII]” *General Electric Corporation v. PHRC*, 469 Pa. 292, 303, 365 A.2d 649, 654 (1976). Although the independent status of our state statute should not be ignored or diminished, for the reasons that follow we agree that this presents a particularly appropriate situation in which to harmonize the two statutes. *Chmill v. City of Pittsburgh*, 412 A.2d 860, 871 (Pa. 1980).

South Dakota

- State Statutory Text

It is an unfair or discriminatory practice for any person, because of race, color, creed, religion, sex, ancestry, disability, or national origin, to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person, employee, or intern with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. S.D. CODIFIED LAWS § 20-13-10.

- State Supreme Court References to Title VII

[T]his Court [previously] indicated that sexual harassment could constitute a violation of SDCL 20-13-10. In light of recent cases from the Eighth Circuit Court of Appeals and the United States Supreme Court, we now expressly acknowledge that principle. We note additionally that SDCL 20-13-10 is comparable to the corresponding provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., which was interpreted by the federal courts to include sexual harass-

ment charges. *Huck v. McCain Foods*, 479 N.W.2d 167, 169 (S.D. 1991).

Tennessee

- State Statutory Text

It is a discriminatory practice for an employer to:

- (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin; or
- (2) Limit, segregate or classify an employee or applicants for employment in any way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age or national origin. TENN. CODE ANN. § 4-21-401(a).

- State Supreme Court References to Title VII

Generally, we interpret the THRA [Tennessee Human Rights Act] similarly, if not identically, to Title VII, but we are not obligated to follow and we are not limited by federal law when interpreting the THRA. *Ferguson v. Middle Tenn. State Univ.*, 451 S.W.3d 375, 381 (Tenn. 2014).

The legislature's stated purpose in codifying the THRA was to prohibit discrimination in a manner consistent with "the federal Civil Rights Acts of 1964, 1968, and 1972, . . ." Tenn. Code Ann. § 4-21-101(a)(1), -101(a)(2). Accordingly, we hold that the stated purpose behind the enactment of our THRA will be best served by maintaining continuity between our state law and the federal law on the issue of imposing employer liability for supervisor sexual harassment. We, therefore, adopt the Supreme Court's recently articulated standard of vicarious liability in all supervisor sexual harassment cases. *Parker v. Warren Cty. Util. Dist.*, 2 S.W.3d 170, 176 (Tenn. 1999).

Wisconsin

- State Statutory Text

Subject to ss. 111.33 to 111.365, it is an act of employment discrimination to do any of the following: (1) To refuse to hire, employ, admit

or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321. WIS. STAT. ANN. § 111.322.

Subject to ss. 111.33 to 111.365, no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters. WIS. STAT. ANN. § 111.321.

Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person: . . . (d) 1. For any employer, labor organization, licensing agency or employment agency or other person to refuse to hire, employ, admit or license, or to bar or terminate from employment, membership or licensure any individual, or to discriminate against an individual in promotion, compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation; or

WIS. STAT. ANN. § 111.36(1).

- State Supreme Court References to Title VII

Considering that the WFEA [Wisconsin Fair Employment Act] and Title VII serve identical purposes, it is appropriate to consider federal decisions discussing the constructive discharge doctrine. We acknowledge that we are not bound by the federal decisions and must disregard such decisions if they conflict with our Legislature's intent in enacting the WFEA. Although Title VII and the WFEA are not identical, the differences are not sufficient to keep us from considering the vast amount of federal law discussing the constructive discharge doctrine. *Marten Transp., Ltd. v. Dep't of Indus., Labor, & Human Relations*, 501 N.W.2d 391, 395 (Wis. 1993).

Wyoming

- State Statutory Text

It is a discriminatory or unfair employment practice: (i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy; WYO. STAT. ANN. § 27-9-105(a).

- State Supreme Court References to Title VII

Wyoming's law prohibiting discrimination in employment matters on the basis of age is similar to the federal Age Discrimination in Employment Act (ADEA). See 29 U.S.C. § 623(a). Thus, we will refer to federal case law for guidance in analyzing claims of ageism. See, e.g., *Kruzich v. Martin-Harris Gallery, LLC*, 2006 WY 7, ¶¶ 13–14, 126 P.3d 867, 872 (Wyo.2006) and *World Mart, Inc. v. Ditsch*, 855 P.2d 1228 (Wyo.1993) (applying federal analysis to claims of handicap discrimination brought under Wyoming law). *Rollins v. Wyo. Tribune-Eagle*, 152 P.3d 367, 370 (Wyo. 2007).