COLUMBIA UNDERGRADUATE LAW REVIEW

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ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

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LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board, we are proud to present the Summer 2021 issue of the *Columbia Undergraduate Law Review*'s print journal. This issue marks the second year of CULR's Print Summer Publishing Program, which is an abridged version of our journal's publication process during the academic year. The two articles featured in this summer edition were carefully selected from a pool of over forty submissions to offer fresh, incisive perspectives on pressing current issues, both domestic and international. Our editors were a team of highly dedicated underclassmen eager to be involved in the CULR community. We are incredibly excited to showcase both the published articles and the hard work of our incredible editors this summer.

The State of Transgender Employment Discrimination Protections in the Wake of Bostock v Clayton County was written by E.C. Rose due to personal and national significance. The current shortage of comprehensive articles on the consequences of *Bostock* and the future of transgender employment law, as well as a complete lack of literature on nonbinary employment protections, make this piece particularly pertinent. In the article, Rose seeks to determine the extent of the ruling's impact on transgender employment law in various areas and circumstances and potential non-*Bostock* pathways or roadblocks to progress.

Rule of Law v Rule by Law: The Doomed Fate of Hong Kong's Autonomy was written in the aftermath of the passage of the National Security Law (NSL) in Hong Kong in the summer of 2020. Author Amy Stein explores the battling legal philosophies between the People's Republic of China and Hong Kong to showcase the inherent weaknesses and naiveness of "One Country, Two Systems." Stein provides a comprehensive analysis of the Hong Kong Basic Law and argues that the law itself contains the means to undermine Hong Kong's autonomy. The article contends that despite the passage of NSL, the Basic Law never truly guaranteed Hong Kong autonomy.

Through this publication, the *Columbia Undergraduate Law Review* seeks to continue in its tradition of exhibiting sharp legal scholarship and cultivating intellectual debate among its readers, especially undergraduates. We sincerely hope you enjoy reading our summer print journal.

Sincerely,
Anushka Thorat & Sarah Howard, Executive Editors, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

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The State of Transgender Employment Discrimination Protections in the Wake of Bostock v Clayton County

E.C. Rose | Swarthmore College

Edited by: Jeannie Ren, Charlie Huang, David Cho, Jennifer Su, Jinoo Kim, Meghan Lannon, and Shaurir Ramanujan

Abstract

In June 2020, the Supreme Court's decision in *Bostock v Clayton County* opened the door for transgender employees to be protected under the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964. The case yielded a six-Justice majority, including Justice Neil Gorsuch and Chief Justice John Roberts, who historically did not rule in favor of LGBTQ+ rights. Although the Court's core finding—that discrimination on the basis of transgender status is considered discrimination on the basis of sex—was groundbreaking, the decision arguably avoided issues that were relevant, but not absolutely necessary, to determine the result. Such issues include the definition of "sex," future methods for evaluating similar cases, and the extent of what can be considered discriminatory. As such, questions remain about who and what will be affected by *Bostock*. An analysis of recent cases and literature provides a sense of the landmark ruling's consequences for transgender employment law. First, while *Bostock* finds that binary-identifying individuals are protected, the decision makes no comment on the status of nonbinary employees under Title VII. There is, nonetheless, the potential for some nonbinary discriminatory acts to adequately mirror those of *Bostock* and consequently be prohibited, and, for acts that do not meet the standards set out in *Bostock*, there may be a more complex, albeit functional, path to protection. Second, it appears likely that *Bostock* grants access to gender-affirming spaces and rules, but the ultimate outcome may depend on the space or rule in question. Finally, future religious freedom cases could endanger *Bostock* protections. The Roberts Court has increasingly prioritized religious freedom over values like anti-discrimination, especially with the addition of Justices Gorsuch, Kavanaugh, and Barrett. *Bostock*'s eventual progeny may prove to be no exception to that trend. *Bostock* is an incredible step toward equal treatment for transgender people, but the relative minimalism of the opinion has the potential to mitigate its impact.

I. Introduction and Background

On June 15, 2020, the Supreme Court ruled on *Bostock v Clayton County*.[1] The 6–3 decision resolved three separate cases raising a common issue: evaluating protection from LGBTQ+ employment discrimination. Each plaintiff was fired—Gerald Bostock of *Bostock v Clayton County*[2] for promoting his gay softball league at work, Donald Zarda of *Altitude Express, Inc. v Zarda*[3] for telling a skydiving student that he was gay in order to make her more comfortable being strapped to him, and Aimee Stephens of *R.G. & G.R. Harris Funeral Homes Inc. v Equal Employment Opportunity Commission*[4] for coming out as transgender and expressing intent to present as female at work. Each individual sought protection from employers retaliating against the discovery of their gay or transgender status. The plaintiffs believed that their termination was due to discrimination on the basis of their sex, which is prohibited by Title VII of the Civil Rights Act of 1964. The Court held that "[a]n employer who fires an individual merely for being gay or transgender violates Title VII."[5] Title VII deems it illegal to "discharge any individual…because of such individual's race, color, religion, sex, or national origin,"[6] and the Court ruled that all three terminations were discriminatory because of sex. As a result of the opinion, the recognized parameters of sex discrimination expanded significantly to include those who were treated differently due to their sexual orientation or gender identity.

It is difficult to overstate the landmark nature of the *Bostock* decision—by deeming discrimination against gay and transgender people illegal, it is an incredible step toward affording LGBTQ+ people equal rights and protection. However, the extent and implications of the ruling are all but settled. The Court opted for a simple, textualist reading of Title VII and did not consider issues that were not absolutely essential to its ultimate decision—such as the precise definition of "sex"—the extent to which transgender people

must be allowed into gender-affirming spaces and codes, and the role of religion in LGBTQ+ discrimination. As such, the aforementioned contentious legal areas that seem related to *Bostock* have been left untouched. This analysis will demonstrate how *Bostock* explicitly protects transgender individuals and evaluate possible outcomes for what the Court declined to discuss.

Bostock is a landmark progressive case, and it came out of a court with a considerable conservative majority. Most notably, Chief Justice Roberts, who dissented in *United States v Windsor*,[7] which struck down the Defense of Marriage Act, and *Obergefell v Hodges*,[8] which deemed same-sex marriage a constitutional right, ruled in favor of the *Bostock* plaintiffs. The conservative history of some of the majority's members on LGBTQ+ rights made the decision an even more impressive accomplishment and was likely the reason for the Court's strict textualism and choice to not discuss more peripheral issues. No matter the consequences of the majority's minimalism, the simple determination that transgender people are entitled to the same treatment as their cisgender counterparts in and of itself does so much more than insulate employees from wrongful termination. It also paves the way for equality in gendered spaces, providing a useful precedent that could be used in the cases about bathrooms and athletics that are currently being litigated. The finding of sex-based causality in the *Bostock* cases also could allow for sex discrimination findings in other statutes with language that mirrors Title VII, such as Title IX, which concerns educational discrimination. Regardless of the outcomes of areas left unsettled, the core of the decision allows for optimism about the future of transgender legal protections in employment law and beyond.

Despite its importance in the movement for transgender rights, *Bostock* is still rather conservative for a decision of such a landmark progressive nature. After considering the core question of what constitutes sex discrimination, "those with a more liberal political leaning would have hoped that Justice Gorsuch just

dropped his pen."[9] The minimalism in *Bostock*—as well as the fact that it only concerns Title VII language and not any wider-reaching constitutional rights—may potentially cause less favorable outcomes for LGBTQ+ plaintiffs in seemingly similar discrimination cases. The lack of constitutional protections established in *Bostock* leaves future defendants with reason to believe that they may be protected by the Religious Freedom Restoration Act (RFRA),[10] a point heavily suggested by the conservative opinion writer. Justice Gorsuch seemed amenable to prioritizing "private employers' 'religious convictions' vis-à-vis the 'super statute' RFRA."[11] Additionally, while *Bostock* explicitly protects "transgender" employees, the opinion's use of the term "transgender" ultimately only refers to those who identify with the opposite binary sex from their birth assignment and does not guarantee the inclusion of those who identify outside of the gender binary. While there may still be ways by which nonbinary-identifying employees could be granted relief under Title VII—perhaps via a particular reading of but-for causation, a more progressive definition of "sex," or gender nonconformity law—the reasoning used would be less straightforward than for their binary transgender counterparts. While such caveats and minimalism make the ruling less progressive than landmark rulings tend to be, it is possible that the limited nature of this opinion is what allowed it to garner a six-Justice majority across the ideological spectrum.

II. The *Bostock* Decision

Bostock ultimately decided that gay and transgender people are protected from workplace discrimination based on those identities since they relate to sex. The main conclusion of the *Bostock* decision was the determination of what constitutes a fundamental connection to the concept of sex. The ruling relied on a textualist reading of Title VII. The Court found that discrimination on the basis of sex includes any discriminatory actions that would not have occurred

"but for" sex.[12] The Court reasoned that one could not evaluate homosexuality or transgender status without considering sex. For instance, expression of attraction to men or self-identification as a woman would not be judged when originating from someone assigned female at birth, but people assigned male at birth, like the three plaintiffs, would be treated differently in those situations. Thus, sex is an integral part of the employers' reason for firing, and the disparity would not exist "but for" that cause.

In order to understand the *Bostock* decision's consequences fully, it must first be acknowledged that the Court saw certain areas where a more conservative definition or standard would yield the same result as a more progressive—and unprecedented—one, so they deferred to the use of a conservative definition of sex and the existing but-for causation standard without claiming that they are the correct way to evaluate future cases. Justice Neil Gorsuch, the author of the opinion, opted not to elaborate where he did not have to. As a result, several conditions were accepted by him and by the plaintiffs without being a precedent-setting definition that a future court ought to accept automatically. As such, while the chosen definition in *Bostock* is less inclusive than some legal scholars had hoped, a future case could solidify a broader or otherwise more progressive definition of sex.

The first and perhaps most consequential choice for the future of transgender rights litigation was to accept a conservative definition of sex. There was a dispute at the Supreme Court level between the parties as to whether sex during the Civil Rights Act's passage in 1964 exclusively meant biological distinctions at birth or something more expansive, but the facts of the case allowed the plaintiffs to accept the more conservative definition without harming their argument. The Court's textual reading ultimately would rule in favor of the plaintiffs even with a conservative "sex" definition, so the plaintiffs could safely concede this point. The three incidents in the *Bostock* decision involved individuals fitting into traditionally

recognized binaries—the gay men were solely attracted to men, and the transgender woman was assigned male at birth and identified as a woman. In each case, the individual clearly would have been treated differently if he or she had behaved the same way as the opposite "sex." Thus, even under the conservative definition of sex, meaning "biological distinctions between male and female"[13] as recognized at birth, the Court ruled in favor of the plaintiffs. The plaintiffs notably conceded this point for the sake of argument, as they felt that they could win their particular cases even under the defendants' definition.

The second major decision that was made, while not opining on the validity of the concept itself, was the use of the "but-for" standard to determine whether discrimination was "because of" sex. Justice Gorsuch acknowledges that there are potentially more lenient standards, but, as before, says that in the absence of a need for a "more forgiving standard, . . . the more traditional but-for causation standard . . . continues to afford a viable, if no longer exclusive, path to relief under Title VII."[14] He indicates that there may be another way to determine causality that does not involve the but-for standard, but he, again, declines to opine. The stricter standard would, once more, not inhibit the plaintiffs' case, so it was accepted in order to avoid litigating issues that were unnecessary to evaluate the particular cases at hand. Again, the decision made it clear that using the standard preferred by the defendants was not a claim of their superiority but rather something best left alone because the plaintiffs could win under either standard.

After acknowledging the definitions and standards for the cases, the Court had to decide if the alleged instances of discrimination were "because of sex."[15] As mentioned prior, the use of "sex" in this context means the individual's biological traits at birth. The Court's determination that "[s]ex plays a necessary and undisguisable role in the decision" to treat an employee differently for being gay or transgender[16] relies on a test of the incident's cause:

the act is discriminatory if the individual being the opposite sex—for example, if Aimee Stephens were assigned female at birth—would change the way that they were treated. This test was first brought forth in *Price Waterhouse v Hopkins*,[17] a case in which a woman was impermissibly penalized for being excessively masculine, or sex-stereotyped, under Title VII. *Price Waterhouse*'s determination that gender stereotyping can violate Title VII was found to also free the plaintiffs from the stereotype that men must be attracted to women and that people assigned male at birth must identify as male, and vice versa. If Aimee Stephens, the plaintiff in *Harris*, had been assigned female at birth, she would not have been dismissed for wanting to adhere to the feminine dress code or present as female; thus, her dismissal on those grounds was based on her sex.

Once it was established that there was no way to separate sex from the reason for disparate treatment, that "sex" was inseparable from gender and sexual orientation, the Court ruled that sex discrimination occurs even if sex is not the most consequential part of an employer's reasoning. All three cases before the Court involved an individual being subject to discrimination for reasons that were not explicitly, exclusively, or even predominantly focused on sex. The Court addressed each of those complications since each of the defendants admitted to discriminating based on homosexuality or transgender status but argued that "intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability."[18] The Court considered three areas in which the discriminatory nature of a sex-based action could be debated: if employers do not explicitly consider sex, if sex is neither the sole nor main cause of the action, and if gay and transgender individuals are being treated equally as their counterparts of the other sex.

The aforementioned complicating factors of discrimination law have been more thoroughly litigated than *Bostock*'s core finding, so the Court looked to precedent for answers. First, the

Court determined that "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it."[19] This decision drew on *Phillips v Martin Marietta Corporation*[20] and Los Angeles Dept. of Water and *Power v Manhart*,[21] which prohibited employment discrimination based on motherhood and female life expectancy, respectively. The former stated that motherhood was too intimately connected with sex not to constitute discrimination when employers refused to hire mothers of young children, a concept echoed in the *Bostock* opinion. In the latter, women were expected to pay more into a pension plan due to their higher life expectancy, and that, too, was prohibited, despite being based on sound actuarial facts. In both cases, the intention was not to particularly disadvantage the members of a single sex; however, the lack of explicit intent to base actions on sex did not prevent the determination of but-for causation and the subsequent striking down of the policies. Using this precedent, the employers in the *Bostock* cases who discriminated based on homosexuality or transgender status—new traits also intimately related to the perception of sex—could not be excused just because sex discrimination was not the explicit intent.

Second, the Court decided that sex not being the sole or primary motivating factor did not preclude it from being causal. This question was also evaluated through the precedents of *Phillips* and *Manhart* and *Oncale v Sundowner Offshore Services, Inc.*,[22] in which the harassers were the same sex as the victim. In each case, there was more than one characteristic in play—sex and parenthood, sex and health, and sex and sex of harasser—but the additional characteristic did not change the outcome. Even when sex is considered the main cause of discrimination, factoring in another trait into an employer's actions has never kept the Court from deeming the action discriminatory as a whole. The individual still would not have been treated the same way as a different sex, so the employer's action still would not have happened but for sex. So

long as there is still proper causation, as determined by the but-for standard, the number of additional factors does not matter.

Additionally, Justice Gorsuch notes that "Congress could have . . . added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law" but did not.[23] He further indicates that, if anything, Congress is becoming open to less substantial relationships than but-for causation, citing their discussion of expanding "Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor,'"[24] which would allow plaintiffs to win employment challenges even without proof of but-for causation. Each of these reasons, both in the determination of definitions and standards, indicates that "it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role" than sex in the discrimination.[25]

The third determination was that seemingly sex-neutral policies that would treat transgender men and women equally but all transgender people differently from cisgender people are also unacceptable under Title VII. In this case, attention is drawn to the emphasis on the individual in the statute's case law. In *Manhart*, which prohibited requiring individual women to pay more into the pension plan because women live longer on average, the Court found that "[e]ven though it is true that women as a class outlive men, that generalization cannot justify disqualifying an individual to whom it does not apply."[26] It was unlawful to put an additional financial burden on individual women because of a higher collective life span. *Bostock,* like *Manhart*, distinguishes between equality at the collective level and equality at the individual level. Here, the Court determined that "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups"[27] while the individual is still mistreated because of their sex.

This determination not only dismantles the final leg of the

argument that discrimination based on gay or transgender identity can be separated from sex but also has potential consequences for future cases. While the *Bostock* case specifically concerned an employer firing an individual for the individual's actions and expression, the Court's determination on the differences between individual and group treatment could potentially prohibit seemingly neutral policies like those of the precedent cases that discriminated against the affected individuals as a group, such as rules that all people must dress as their assigned gender.

The sum of the areas analyzed by the Court means that it would be impossible for employers to discriminate against transgender or gay employees just because they are transgender or gay without violating Title VII. That is, of course, assuming a perfectly simplistic scenario in which there is no motivation compelling enough to overpower Title VII's demands, and one in which the employee conforms to identities and behaviors of one gender so that they would clearly be treated differently if they were the opposite sex. There are many people whose gender identity and expression do not entirely conform to the binary, and questions around definitions of "sex" and the convenience of relatively black-and-white identities make the extent of *Bostock*-esque protections for nonbinary people difficult to access.

III. Nonbinary Protections

Nonbinary people—those who identify with a gender other than male or female—may have more difficulty finding protection under *Bostock*. Nonbinary gender identities are not purely defined by their relationship to their birth-assigned sex, nor do the people who identify with them frequently conform to the norms of a single gender, so they may not always be treated differently than if they were assigned the opposite sex at birth. These people may use a number of different terms to describe themselves; although, for the

sake of clarity, this discussion will refer to those who do not identify as exclusively male or exclusively female as nonbinary. This has left some who identify as nonbinary wondering if they will be protected at all by *Bostock*.

The binary nature of *Bostock*'s consideration of how people would be treated as the opposite birth-assigned sex could prevent nonbinary people from accessing the same protections as their binary-identifying counterparts. Given *Bostock*'s focus on a binary-identifying transgender woman, "it remains unclear whether Title VII applies to nonbinary or gender-nonconforming individuals, who do not identify as strictly male or female."[28] Nonbinary individuals' lack of identification with a single, binary gender seems to limit the extent to which they could receive protection. While the Court dismissed arguments that transgender people, in the legal, binary sense of the term, could be treated differently on the basis of being transgender without being on the basis of sex, such a distinction may not apply to nonbinary individuals. No knowledge of a person's birth sex is necessary to assess that someone does not adhere to the norms of any sex, so it would be much more difficult to argue that they are protected by *Bostock*. This distinction "creates a potential loophole for employers to permissibly discriminate against individuals without technically implicating sex discrimination."[29] This is, of course, all based on the definition of sex that the Court used without claiming its long-term legitimacy. "[T]he Court avoided deciding if Title VII's definition of sex could be interpreted to expand beyond the male-female dichotomy,"[30] but if future courts were to determine otherwise, it is entirely possible that nonbinary protections would be enhanced under a less binary definition. Until and unless that happens, it seems that the *Bostock* definition is unlikely to change much for nonbinary people.

The portion of the population that considers themselves nonbinary is small and underrepresented. Comparatively, the portion of people that consider themselves bisexual, in this case

referring broadly to one who is attracted to two or more genders, is a much larger segment of the population and receives more attention. As such, few experts have considered the repercussions of the test in *Bostock* on protections for nonbinary people, but more have considered them for bisexual people. While one identity concerns gender and the other sexuality, it is likely that the two groups will, in many ways, be treated similarly under *Bostock*. In both cases, the individual may engage in behaviors that are not traditionally characteristic of either sex, such as presenting as or being attracted to a mixture of multiple gender presentations, and the source of the discrimination may be that straddling of traditionally gendered behaviors, rather than the preference to adhere to the norms of the opposite sex.

For both groups, there is an uncertain future in the area of having the *Price Waterhouse*/*Bostock* test provide protection from gender stereotyping, but it is not nearly as bleak as it may initially seem. While cases surrounding issues of nonbinary and bisexual discrimination may have to be considered on more of a case-by-case basis and may rely more on the personal sympathies of each judge, it is still possible that certain forms of discrimination against such people would be validated through the aforementioned test. A nonbinary or bisexual identity is unlikely to be recognized as an inherently sex-based identity, but specific characteristics of individual discriminatory cases and precedent from which *Bostock* was drawn paint a more optimistic picture. While each identity is technically distinct and independent from sex, each is still *related* to sex. Sex may not cause the discrimination for nonbinary and bisexual employees, but the very concept of expressing characteristics of multiple sexes or no sexes is still very much intertwined with sex, even if not exactly in the way that the *Bostock* examples are. As such, some may be able to find relief through the *Bostock* determination, others via a future redefining of "sex," and others still via the gender nonconformity argument of *Price Waterhouse*.

One potential route to protection in certain cases regarding nonbinary or bisexual individuals is in recognizing that, at the case's core, it still would not have happened but for the individual's sex, thus prohibiting the discrimination just as in the cases in *Bostock*. The way in which this could occur for bisexuals would center on a particular point made at the district court level in *Zarda*: "[t]he gender stereotype at work here is that 'real' men should date women, and not other men."[31] Bisexual people do not entirely adhere to nor subvert this stereotype: "bisexual men do conform to the first part of dating women" but they "violate the second part of the stereotype by dating men."[32] It is possible that, in some cases, the same-gender attraction, rather than the variety of attraction, experienced by a bisexual employee would be the reason for discrimination. "[W]hen a bisexual person is discriminated against for having a picture of her same-sex partner on her desk, it is unlikely that a person will stop to clarify whether she is bisexual or gay before discriminating against her," because it is only "her sex in relation to her female romantic partner" that is viewed as objectionable.[33] If the discrimination is not based on attraction to multiple genders but, instead, is focused on the part of a person's identity that involves same-gender attraction, then a court may be able to find but-for causation just as they would in the case of a gay person.

This potential finding of but-for causation has a clear application to the protection of nonbinary employees' physical presentation. If, for example, a nonbinary person who was assigned female at birth opts to wear a men's suit but has long hair, they would have hair consistent with the stereotypes of their sex and clothing consistent with that of the opposite sex. If they were only told that they could not wear the suit, the court might find but-for causation in that case as well, given that a male designation at birth would have granted them permission to dress in that fashion. If a court were willing to look at these individual instances, recognizing that often the part of the expression that turns certain behaviors unacceptable

is the part that aligns with the opposite sex, then there may be a future, even if not an ideal one, for nonbinary and bisexual people even under the exclusionary definitions in *Bostock*.

Another potential path to protection comes from the State Department's recent decision to move toward adding an "X" designation option to passports.[34] The X designation would provide a legal sex option that is neither male nor female and could ultimately lead to a legal acknowledgment of the existence of intersex and nonbinary people. If the Court interprets the marker as a traditional legal sex, then a person using an X designation to describe their birth-assigned sex may be protected by traditional sex discrimination case law just as cisgender women have been for decades, and a transgender person using the X designation could potentially be protected because they would not be treated in such a way but for their lack of X designation. In any case, it would force the courts to consider gender and sex in a less binary way, potentially leading this exclusionary component of *Bostock* to not hold up over time.

As it currently stands, with "sex" referring to that which was assigned at birth for the sake of argument, and without any acknowledgment of intersex people, a third recognized sex designation would change very little. However, as future cases may provide a more concrete and, perhaps, more progressive definition of "sex," it could be instrumental in protecting nonbinary workers. It may be overly optimistic to think that the Supreme Court will redefine sex to explicitly include nonbinary gender identities, but it is relatively realistic to believe that a future Court may decide that "sex" references the sex marker indicated by identification cards and other government documents. In such a case, the new passport designation could define some people as having a "nonbinary sex" and subsequently provide them protections against sex discrimination under *Bostock*. It is impossible to know how the Court will respond to the new designation, whether or not it will alter definitions or the binary understanding of sex, or how it will intertwine with the

opposite sex in *Bostock*, but these potential avenues indicate that the new sex designation option may be part of the path to relief.

There is another potential avenue for nonbinary and bisexual people—one that is less directly rooted in *Bostock* itself and more in the precedent from which it came. *Bostock*, as it concerned a binary-identifying transgender woman and two cisgender gay men, was able to easily and clearly demonstrate that each individual would not have been treated as poorly had they been assigned the opposite sex at birth. However, *Price Waterhouse* itself concerned a woman who acted in traditionally masculine ways. In the eyes of the law, a person who has a designated sex and presents in a way somehow inconsistent with that designated sex (such as the plaintiff in *Price Waterhouse*) is gender nonconforming. For many nonbinary people, this is the core of their experience: they understand their gender to be not exclusively a single, binary gender—they may identify with more than one gender, no genders, a gender that is not male nor female, or something else entirely—but the current legal definition of sex forces a binary choice upon them. The law will say, under the definitions held in *Bostock*, that they are male or female, but they will not identify that way, often, but not always, taking on a physical expression that is meant to not be perceived as exclusively masculine nor feminine. Regardless of the deep, nuanced understanding of one's own nonbinary gender that can be held, the law currently classifies them as a man or woman failing to adhere to the norms of their birth-assigned sex.

It is possible that future courts would see nonbinary people as gender-nonconformers. There is precedent for this: courts have previously viewed binary-identifying transgender women, for example, as failing to "conform to sex stereotypes concerning how a man should look and behave."[35] This is ultimately an inferior way to achieve protections for binary-identifying transgender people than the arguments set forth in *Bostock*. Specifically, this gender-nonconformity reasoning reinforces the notion that transgender

women are not real women but "insufficiently masculine" men, and that transgender men are insufficiently feminine women, which not only undermines their identities but also the legal recognition of the ability for gender to change.[36] *Bostock*, on the other hand, recognizes that the firings were discriminatory against people assigned male at birth, regardless of gender identity. Focusing on the sex assigned at birth and treatment relative to that assignment allows even a court that referred to the transgender plaintiff with the incorrect gender and pronouns to recognize the root cause of discrimination. *Bostock* acknowledges that "[t]hese are not cases where transgender persons are discriminated against because of a failure to conform their gender to their sex assigned at birth," but "cases where transgender persons are discriminated against because of what their sex assigned at birth *is*."[37] This approach is not only more legally gender-affirming but also more accurately portrays the root cause of discrimination. As such, once the *Bostock* precedent is available, the gender nonconformity argument is not the best fit for transgender men and women and is better not used when avoidable.

While an ideal legal world would willingly and proactively respect the identities of all transgender people, binary or not, granting them dignity at work, current case law does not reflect that. It has only outlined specific protections that assume that all employees fit into a gender binary, which may preclude nonbinary people from being protected. This is especially so if the source of an employer's bias is not clearly the employee's actions that are characteristic of the opposite sex. Before Bostock is extended to nonbinary people, either via circumstances like the Zarda example or via the recognition of a third "sex," gender nonconformity law may provide relief. With the current vacuum of protections, and only until better protections are available, this argument may be more strategically effective and ethical than when it is applied to binary-identifying transgender people.

This distinction from those who identify within the binary, who are able to change their legal sex to the one that they identify with, is significant when considering the potential harms of such an argument. To argue that a transgender person is a non-conforming version of their birth-assigned gender undermines their affirming, legally-acknowledged ability to change their sex. However, given that, in most cases, a nonbinary person is not afforded that option, they would not be undermining any existing, affirming legal treatment by making the case that they do not conform to their legal sex. As such, as the X designation becomes available at the federal level, this avenue may become less desirable and more harmful for the legal recognition of nonbinary people, just as it has become for binary-identifying transgender people. Future litigation will determine whether the X designation is considered a true legal sex or more of a placeholder for those who do not want a male or female designation, and that determination may alter the desirability of this argument. Similarly, any other advancements made in expanding the definition of "sex" would make its use undesirable and counterproductive. Until those better outcomes are a reality, however, gender nonconformity law could provide essential protection.

There are also two ways, similar to the movement toward the new "X" sex designation, in which Title VII protections could be indirectly extended to nonbinary people via federal action. The first is by passing the Equality Act, which would "prohibit discrimination on the basis of sex, gender identity, and sexual orientation." Adding specific language about gender identity may remove the need to protect nonbinary people via "sex." Second, the Equal Employment Opportunity Commission could provide guidance to include nonbinary people in Title VII protection as the statute currently exists. Either of these ways would push the Court closer to acknowledging nonbinary discrimination as sex discrimination.

While there is nothing in *Bostock* that expressly protects nonbinary people, there is nonetheless reason to be hopeful. Between case-specific applications of *Bostock*, less-harmful gender-nonconformity cases, and potential for the near future to bring more gender inclusivity via the federal government and court action, it is imaginable that a set of protections could be pieced together. However, even if Title VII can provide relief to nonbinary people in simpler employment cases, these protections may not grant relief from everyday gendered phenomena. Gendered bathrooms, dress codes, and other types of gender-based distinctions can be as hurtful to a nonbinary person as requiring a transgender person like Aimee Stephens to present as the gender that they were assigned at birth. However, there seems to be no version of the opposite sex test with the current definitions and laws that would mandate non-gendered options. More likely, employers would be required to simply allow nonbinary people to access whatever gendered option they prefer and grant as many opportunities to be free from gendered actions as is reasonable. While the state of the law for nonbinary people is far from ideal, there is hope to be had by all transgender people for their protection and access to gender-affirming workplace experiences under *Bostock*.

IV. Gendered Spaces and Rules

Of all of the ambiguities and untouched implications of *Bostock*, that which is perhaps most likely to yield trans-inclusive results is the ongoing debate, both legal and social, about gendered spaces and rules. The *Bostock* decision seems uniquely applicable to gender-defined or gender-segregated components of everyday life because they provide such a clear picture of what the opposite sex would be allowed to do. The topic is also close to the heart of the issue—allowing transgender people, both binary and nonbinary, to engage with affirming bathrooms, sports teams, and other types

of gendered spaces and rules have become common subjects of transgender discrimination lawsuits. The liberty of transgender people to align daily experiences like bathroom use or uniform-wearing with their gender identity is fundamental to treating transgender women as women and transgender men as men. While Justice Gorsuch did not elaborate on what actions other than firing or refusal to hire could be discriminatory, a case can easily be made for access to gender-affirming spaces and rules being protected using *Bostock* as precedent, at least for binary-identifying people. If a woman wants to use the women's restroom or wear dresses to work, it is difficult to imagine that much of anything other than her birth-assigned sex would determine whether or not an employer would permit her to do so.

While *Bostock* seems to demand inclusion in gendered contexts, it must be acknowledged that not all gendered cases under Title VII or similar statutes would necessarily yield the same result. There is a difference in the claims made by the opposition between certain gendered contexts: in cases where nudity or undressing is potentially involved, such as in a locker room or bathroom, some cisgender people feel uncomfortable with the idea of carrying on those activities around someone who is anatomically different, even if they would be comfortable with that person identifying and presenting as that gender the rest of the time. Additionally, there are claims that allowing transgender people onto sports teams would give them an advantage, particularly transgender women competing on teams against cisgender women, so it remains to be seen "whether banning transgender girls and women" from competing in women's competitions and teams "constitutes discrimination."[39] These sports bans may have more legal success than other gendered rules. They tap into a fear about fairness that can make them seem more acceptable than blatant bigotry, which may lead to courts viewing them more favorably. Should *Bostock* precedent be insufficient to strike down sports bans, there is also the possibility that gendered

spaces and rules would automatically become trans-inclusive under the more explicitly inclusive Equality Act, should it be passed.[40]

Given that only firing was at issue in *Harris*, whether or not Aimee Stephens would have been granted all of the rights of a cisgender woman is likely, albeit unprovable. The Supreme Court has yet to rule on a case pertaining to restroom inclusiveness or any other gendered space or rule whatsoever. Still, other evidence suggests that courts, including the Supreme Court, would consider access to the preferred gendered rule or space as a part of a non-discriminatory workplace. The existing litigation, which primarily focuses on bathrooms, paints a favorable picture.

It is useful to look at litigation on sex discrimination under Title IX when trying to understand the reach of Title VII and vice versa. Both statutes specifically prohibit sex-based discrimination, meaning that it is likely that what constitutes sex discrimination based on one text would likely constitute discrimination based on the other. While there are, of course, differences in outcomes even with similar cases and statutes, and in *Bostock*, the Court "avoided determining whether this opinion would affect homosexual and transgender discrimination under other similarly phrased statutes" such as Title IX,[41] the similarities between the two areas of law nonetheless make them uniquely comparable when dealing with textualist interpretations. Additionally, in *Fitzgerald v Barnstable School Committee*,[42] the Court held that "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VII was."[43] On the issue of bathrooms and transgender discrimination, it is especially useful to look at relevant Title IX cases, which receive much more legal attention than Title VII cases.

Responding to the concerns about cisgender individuals' privacy and safety, the Ninth Circuit Court of Appeals ruled in *Parents for Privacy v Barr*[44] that policies that allow transgender students to use their preferred bathroom do not violate the rights

of uncomfortable cisgender students. The plaintiffs claimed that the policy was at odds with "Title IX, as well as the constitutional…right to privacy, the parental right to direct the education and upbringing of one's children, and the right to freely exercise one's religion."[45] The Ninth Circuit found none of these reasons to be sufficient to bar a transgender student from affirming facilities. While this case does not specifically concern the discriminatory nature of barring students from certain bathrooms, it does indicate a limited appetite for common rationales that discriminatory policies may employ. This case's facts and ruling mirror the Third Circuit's determination in *Doe v Boyertown Area School District*[46] a year earlier. Both cases, ruled on at the Appeals level before the Supreme Court's *Bostock* decision, concluded that there was no substantial privacy case to be made for cisgender students. Another case concerning Title IX and bathrooms before Bostock was *Whitaker v Kenosha Unified School District* [47] in the Seventh Circuit. The facts of *Whitaker* reflected the more common transgender bathroom lawsuits in which the plaintiff is a transgender student barred from using an affirming bathroom. Like the previous cases, the court ruled in favor of the transgender student, validating both Equal Protection and Title IX concerns. In all three pre-*Bostock* cases, the losing party filed a petition for certiorari to the Supreme Court, and the Court denied to hear the case, allowing the transgender-inclusive rulings to stand.

After the *Bostock* decision was handed down, within months, two more courts ruled on the bathroom issue in similar cases to Whitaker with the same positive results. The Eleventh Circuit Court of Appeals in *Adams v School Board*[48] ruled, as in *Parents for Privacy*, that there was "no substantial relationship" between the privacy interests of the school and their prohibition of the plaintiff's bathroom use. Furthermore, the court determined that the plaintiff received "unfavorable treatment" because "he defie[d] gender stereotypes as a transgender person,"[49] making a decidedly *Bostock*- and *Price Waterhouse*-esque argument. There

has not yet been a petition for certiorari in this case. The Fourth Circuit evaluated a similar case in *Grimm v Gloucester City School Board*,[50] in which the decision explicitly extended *Bostock* to Title IX, saying that it "guided" their "evaluation of claims under Title IX." They considered "whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender," and it "join[s] a growing consensus of courts in holding that the answer is resoundingly yes."[51] The Supreme Court, standing by the precedent it set in *Bostock*, indicated it did not see reason to intervene in the aforementioned consensus and denied certiorari in *Grimm*.

Perhaps the most compelling evidence for the potential success of bathroom and sex-segregated sports cases comes from Justice Samuel Alito's dissent itself. Justice Alito describes what he fears to be the ultimate consequences of *Bostock* in explaining his reasoning for not siding with the majority. He believes that "transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify,"[52] and that the lack of specific definition for "transgender" could allow people into the spaces that they prefer, regardless of if they have taken medical steps in their transition. He writes that "[t]he Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed."[53] Justice Alito also draws attention to the Title IX debates about transgender students in sports, saying that he believes that *Bostock* could have the consequence of school, college, and even professional athletic organizations being required to treat transgender athletes as their identified gender.[54] Finally, he argues that "[t]he Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates."[55] In this portion of his dissenting opinion, Justice Alito confirms the relationship between Title VII and Title IX and suggests that one reason for his dissent is that he believes that the holding in *Bostock*

would require the inclusion of transgender people in gendered spaces.

With a significant likelihood that *Bostock*'s eventual progeny could demand that binary-identifying transgender people be allowed to use whatever bathroom, dress code, or similarly gendered phenomenon that makes them most comfortable, there is a question as to whether or not the case opens up the door to the elimination of gendered spaces entirely. It would achieve the goal of providing gender-neutral options for nonbinary people, albeit in a drastic way. *Bostock*'s take on the *Price Waterhouse* opposite sex test could potentially result in all sex-segregated spaces being considered discriminatory. Justice Gorsuch took care to write that "under Title VII itself, [dissenters] say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today," but that the court does "not prejudge any such question today."[56] Still, despite the lack of comment, it is nonetheless possible that *Bostock*'s reasoning could be applied to the abolition of all gendered spaces.[57] In theory, it seems that it could have that result; permission to enter a women's bathroom is wholly dependent on if the individual is seen as a woman or not, and thus it would be discriminatory to prohibit the entry of any individual based on their gender. However, in practice, the elimination of gendered spaces as a whole would most likely have much stronger pushback than would the admittance of individual transgender students into an affirming bathroom. As such, it is impossible and irresponsible to assume that these cases would resolve in the same ways that the circuit court bathroom cases did, even if the same logic could potentially yield both results. This remains an unsettled area of law, one in which the resolution is much more difficult to even begin to predict, especially given a likely vast public opposition to such a step.

Title VII, however, may not be the sole, uneven path to workplace discrimination relief. In all of the aforementioned lower court cases, not only are the courts entirely clear about the protections

granted to transgender students and the comparatively small risk of privacy loss for cisgender students, but some also consider and favor Equal Protection claims. In both *Whitaker* and *Grimm*, the courts heard and favored plaintiffs' arguments that declared that they were protected under Title IX, just as Stephens was under Title VII in *Bostock*, as well as the Fourteenth Amendment's Equal Protection Clause—something not currently recognized by the Supreme Court. If the Court takes up *Grimm* or any similar case, it may consider whether or not transgender people should be granted equal protection in and out of the workplace via the Fourteenth Amendment. As such, these cases do not only indicate a hopeful future for bathroom litigation concerning Title VII but also open up the possibility of recognition of transgender individuals under the Constitution.

Bostock and the case law on gendered spaces give reason to be optimistic that the daily comfort and affirmation of transgender people will tend to be prioritized over the personal preferences and occasional discomfort of cisgender people. Several circuit courts have determined that transgender students have the right to use the bathroom of their choice, both before and after *Bostock*—some even invoking the case in their reasoning—and the Supreme Court has shown no desire to overturn such rulings. Cases about transgender athletes may have more teeth as defendants claim that transgender female athletes have a biological advantage, but it has not been sufficiently litigated give a coherent picture yet. The inclusion of of transgender people in gendered contexts is essential, and the law seems likely to grant that protection.

V. Religious Freedom

While there is room for optimism regarding many components of *Bostock*, religious freedom may frequently inhibit the ubiquitous protection of transgender people in the workplace. The competing and often conflicting liberties of religion and LGBTQ+

expression have often gone to the courts and will continue to do so. Specifically, in recent months, the Supreme Court has yielded a relatively clear picture of how religion should be considered, or rather, how it should be prioritized. This helps to indicate the possibility that "recent wins by the LGBTQ+ community" are in the "most immediate danger" of being limited by the Court.[58] Recently, "[m]any questioned whether Bostock has much significance after the *Our Lady of Guadalupe School v Morrissey-Berru* decision, which allowed LGBTQ+ and other discrimination for a wide class of religious employees considered to have a 'ministerial' function."[59] This understanding of the Court's general preference for religion over LGBTQ+ rights stems from two areas: the handling of religion in the *Bostock* opinion and recent cases involving religious freedom, particularly concerning the RFRA as well as the Free Exercise Clause. Evidence found in both contexts strongly suggests a bias toward religious freedom over most secular arguments. The former area is straightforward, albeit untested by a later case, and the latter has clear Supreme Court precedent but cannot be directly applicable to *Bostock*-type cases.

Much like other unsettled areas of transgender protections, religious freedom is an area that Justice Gorsuch has declined to discuss in the majority opinion—although he was receptive to religious freedom concerns. Justice Gorsuch writes that the Court is "deeply concerned with preserving the promise of the free exercise of religion."[60] He then recognizes that both Congress and the First Amendment protect religious organizations that do not comply with anti-discrimination efforts. He "signaled that, at least for him, this opinion would be very different had one of the three employers made an argument based on the RFRA."[61] The defendants in *Harris* presented an RFRA argument at the appeals level but did not ask the Supreme Court to evaluate it, allowing the Court to not consider the issue at this juncture.[62] Justice Gorsuch acknowledges the RFRA "as a kind of super statute [which] might supersede Title

VII's commands in appropriate cases."[63] Specifically, the RFRA "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[64] Despite the attention that he gives to the act, Justice Gorsuch argues that the relationships between such religious protections and gay and transgender protections like those in Title VII raise "questions for future cases." [65] The Court avoided making an explicit decision about RFRA in *Bostock*, but it would have likely responded favorably to a religious argument.

Bostock does not explicitly protect or not protect employees from religious freedom-based discrimination, but the attention given to the history of RFRA-based claims being supported, the lack of attention given to any legal history or possible counterargument, and the renewal of the commitment to protecting free exercise certainly suggest that the Court may respond favorably to RFRA cases. "[T] he majority opinion did address that religious liberty doctrines including RFRA will interfere with the Title VII protections" and spoke about it in a way that indicates "that when the case ultimately comes before it, the construction and purpose of a genuine claim under RFRA will protect an employer from the penalties of a Title VII violation."[66] The language used in the opinion, such as the aforementioned "super-statute" comment, suggests that the Court "not only expects—and perhaps even invites—this issue to resurface, but that it will likely permit the RFRA to supersede Title VII's protection[s]" laid out in *Bostock*.[67] This likely outcome is supported by recent prioritizations of religious freedom over the rights of others—some of which directly pertain to LGBTQ+ discrimination or Title VII.

In recent years, the Court has proven itself to be extremely receptive to religious freedom and religious exemption arguments, as was suggested by the topic's handling in the opinion.[68] A study

by Epstein and Posner[69] found that "[t]he Roberts Court has ruled in favor of religious organizations far more frequently than its predecessors—over 81 percent of the time, compared to about 50 percent for all previous eras since 1953."[70] The Court's willingness to not only prioritize religious freedom but also to prioritize it over LGBTQ+ rights was exhibited in the opinion in *Masterpiece Cakeshop v Colorado*.[71] While it was a narrow ruling that focused on a particular Colorado law, the opinion nonetheless stated that "[t]he laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."[72]

The most recent terms' decisions have reflected Epstein and Posner's finding that religious prioritization has recently increased dramatically, especially considering each of the conservative additions to the Court during the Trump administration. Within the month following the *Bostock* decision, the Supreme Court ruled on three major religious freedom cases. In each of the three cases, the Court ruled in favor of the religious institutions. One held that parents should be allowed to use government-funded private school scholarships at religious private schools.[73] They found that some families were unable to get the same value out of the program because of their "religious views and the religious nature of the school they had chosen."[74] Additionally,[75] the Court held that "employers with religious and conscientious objections" could be exempted from the mandate that all employers provide contraceptives through healthcare,[76] which built upon and expanded the precedent in *Burwell v Hobby Lobby Stores, Inc.*[77] The Court is willing to honor the desires of religious individuals and collectives alike, even when those desires demand sacrifices from non-religious individuals.

The third major religious freedom case decided in the last term was *Our Lady of Guadalupe School v Morrissey-Berru*.[78]

The ruling was that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[79] The teachers considered in this case were working at a Catholic school but did not have, in the traditionally assumed sense, a ministerial role. This ruling, despite its concern of institutions that are more distinctly religious than those in the aforementioned cases, still allowed generally-prohibited forms of Title VII discrimination to occur against a person in a somewhat non-religious job. It could potentially have the most consequences for the applicability of *Bostock* to cases concerning religion, as it specifically considers the relationship between Title VII and a religious institution. The Court determined that religious institutions are immune from employment discrimination lawsuits when such suits are brought by staff considered central to the educational mission, even in situations that are not reasonably tied to religious beliefs. When coupled with the Court's willingness to define institutions that are not places of worship as religious, this could spell serious problems for LGBTQ+ employees bringing cases against religious employers.

With the installment of Justice Amy Coney Barrett on the Supreme Court, the Court has continued to rule in favor of religious institutions' autonomy and freedom, most notably in their findings about COVID-19 restrictions' impacts on religious services. Specifically, the Court has granted injunctive relief in two cases that were requested by religious institutions whose practice was hindered by COVID-19 restrictions that required the closure of churches and other houses of worship.[80] One such case, *South Bay United Pentecostal Church v Newsom*,[81] illustrates the recent shift even further in the direction of deference to religious organizations, as the previously denied request for injunctive relief was partially granted after the change on the Court.[82] Thus, this case shows that there has been a noticeable shift toward protecting religious freedom over most other concerns in the last year since *Bostock*. All of these

factors—the history of deference, the change in court makeup, and the allusion to potential deference in future Title VII cases—suggest a grim future for transgender discrimination suits brought against religious employers. *Bostock* has the potential to dramatically change the experience of transgender employees, but only as long as employers cannot easily access an excuse to be immune from such lawsuits.

VI. Conclusion

It is clear that *Bostock* has made major advances toward equality. "*Bostock* has given the LGBTQ+ community, and particularly transgender individuals, a solid starting point for catalyzing equality in all aspects of society"[83] as the first Supreme Court case to find LGBTQ+ people protected under a sex discrimination law. Its broadly applicable reasoning provides a foundation upon which future litigation can be built, just as seen in the Title IX cases, whether the case concerns employment, bathrooms, sports teams, education, healthcare, housing, or any area with a similarly worded statute. The extension of what is already understood as a legitimate test for sex discrimination to transgender employment cases signals a strong future not only for the direct progeny of *Bostock* but also for all other cases in which its reasoning could be invoked.

This does not, however, mean that the case signals success for all future transgender plaintiffs. There are still a number of unresolved areas. Some, like bathroom cases, have serious potential for further expansion of transgender rights, but others, like those of religious freedom and, to a lesser extent, the expansion of rights to nonbinary people and sports team inclusivity, give cause for pessimism. Until and unless transgender rights are found in the Constitution by the High Court—perhaps implied by the Fourteenth Amendment as suggested by some of the bathroom cases—potential roadblocks like free exercise, the comfort of cisgender people in

bathrooms and on sports teams, and the limitations of *Bostock*'s binary but-for test can, and perhaps will, dictate the extent of transgender rights in employment and more broadly. As such, some of *Bostock*'s landmark potential was lost, in part because it was written narrowly and in part because it was based on a statute, the Civil Rights Act. If it were based on a constitutional right, just as a number of the bathroom cases relied on the Equal Protection Clause, that could give transgender people protections beyond environments bound by Title VII.

Ultimately, *Bostock* falls short of a perfect solution to transgender workplace inequality—it has shortcomings in the scope of the case, both forced upon and chosen by the Court—but people will look back on the case as an important moment in LGBTQ+ history. It is understandable that it has disappointed some who wanted more sweeping language, more explicit protections, or less deference to religious freedom. It is, however, plausible that some of these undesired components were necessary to create a majority that would rule in favor of the gay and transgender plaintiffs. Ultimately, its precedent has the power to catalyze a series of landmark rulings for transgender people that are not simply limited to an employment context. *Bostock*, despite its imperfections, held that gay and transgender people must be treated with the same dignity and o *Bostock*, despite its imperfections, held that gay and transgender pportunities as any other person, and its reading of Title VII can be the key to a better future for all LGBTQ+ employees.

[1] *Bostock v Clayton County*, 590 U. S. ____ (2020)
[2] Ibid.
[3] *Altitude Express, Inc. v Zarda*, 590 U.S. ____ (2020).
[4] *R.G. & G.R. Harris Funeral Homes Inc. v Equal Employment Opportunity Commission*, 590 U.S. ____ (2020).
[5] *Bostock v Clayton County (2020)*, slip op, 1.
[6] Civil Rights Act of 1964, 42 U.S.C. §2000e (1964).
[7] *United States v Windsor*, 570 U.S. 744 (2013).
[8] *Obergefell v Hodges*, 576 U.S. 644 (2015).
[9] Darren J. Campbell and Casey R. Johnson, "Bostock v Clayton County, Georgia: a Landmark Win for the LGBTQ+ Community or a Mask for Private Religious Discrimination?," 62 *Orange County Lawyer* 24, 26 (2020).
[10] Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb (1993).
[11] Campbell and Johnson, *Orange County Lawyer*, 26.
[12] *Bostock v Clayton County* (2020), slip op, 9.
[13] Ibid
[14] Ibid, 10.
[15] Ibid, 13.
[16] Ibid, 6.
[17] *Price Waterhouse v Hopkins*, 490 U.S. 228 (1989).
[18] *Bostock v Clayton County* (2020), slip op, 3.
[19] Ibid, 18.
[20] *Phillips v Martin Marietta Corporation*, 400 U.S. 542 (1971).
[21] *Los Angeles Department of Water and Power v Manhart*, 435 U. S. 702 (1978).
[22] *Oncale v Sundowner Offshore Services*, *Incorporated*, 523 U. S. 75 (1998).
[23] *Bostock v Clayton County (2020)*, slip op, 10.
[24] Ibid, 16.
[25] Ibid, 19.

[26] *Los Angeles Dept. of Water and Power v Manhart*, 435 U. S. 702 (1978).
[27] *Bostock v Clayton County (2020)*, slip op, 19.
[28] Anne Elisabeth Poe, "Title VII's Hidden Agenda: Sex Discrimination, Transgender Rights, and Why Gender Autonomy Matters," 72 *Alabama Law Review* 641, 652 (2021).
[29] Ibid, 652.
[30] Ibid.
[31] *Zarda v Altitude Express, Inc.*, 883 F3d 100, 121 (2nd Cir 2018), citing *Centola v Potter*, 183 F.2d 403, 410 (D. Mass. 2002).
[32] Michael Conklin, "Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments," 11 *University of Miami Race and Social Justice Law Review* 33, 49 (2020).
[33] Nancy C. Marcus, "Bostock v Clayton County and the Problem of Bisexual Erasure," 115 *Northwestern University Law Review Online* 223, 228 (2020).
[34] Marina Pitofsky, "The State Department is adding another gender option on passports. Here's what you need to know," *USA Today*, (July 1, 2021), usatoday.com/story/travel/news/2021/07/01/passport-have-new-gender-option-added-non-binary-people/7826603002/.
[35] Smith v City of Salem, 378 F3d 566, 572 (6th Cir 2004).
[36] Naomi Schoenbaum, "The New Law of Gender Nonconformity," 105 *Minnesota Law Review*, 831, 887 (2020).
[37] Ibid, 835.
[38] HR 5, 117th Cong, 1st Sess (Feb 18, 2021).
[39] Jacqualyn Gillen, "Comment: Striking the Balance of Fairness and Inclusion: The Future of Women's Sports After The Supreme Court's Landmark Decision in Bostock v Clayton County, Georgia," 28 *Jeffrey S. Moorad Sports Law Journal* 415, 415 (2021).
[40] HR 5, 117th Cong, 1 Sess (February 18, 2021), (June 8, 2021).
[41] Poe, 72 *Alabama Law Review*, 652.

[42] *Fitzgerald v Barnstable School Committee*, 555 U.S. 246, 248 (2009).
[43] Ibid.
[44] *Parents for Privacy v Barr*, 949 F.3d 1210, 1217 (9th Cir 2020).
[45] Ibid.
[46] *Doe v Boyertown Area School District,* 897 F.3d 518 (3rd Cir 2018).
[47] *Whitaker v Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir 2017).
[48] *Adams v School Board of St. Johns County*, 968 F.3d 1286, 1297 (11th Cir 2020).
[49] Ibid.
[50] *Grimm v Gloucester County School Board*, 972 F.3d 586, 617 (4th Cir 2020).
[51] Ibid, 593.
[52] *Bostock v Clayton County* (2020), slip op, 45-46 (Alito, dissenting).
[53] Ibid, 46.
[54] Ibid, 47.
[55] Ibid, 48.
[56] Ibid, 31.
[57] Poe, 72 *Alabama Law Review*, 652.
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[59] Martricia O'Donnell Mclaughlin, "The 2020 LGBTQ Rights Symposium: Ungodly Claims: LGBTQ Civil Rights And Religious Liberty," 91 *The Pennsylvania Bar Association Quarterly* 122, 130 (2020).
[60] *Bostock v Clayton County (2020)*, slip op, 32.
[61] Campbell and Johnson, *Orange County Lawyer*, 26.
[62] *Bostock v Clayton County (2020)*, slip op, 31.

[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] John Bursch, "Religious Liberty Law: Religious Liberty at the U.S. Supreme Court: 2020 Term," 100 *Michigan Bar Journal* 38, 40 (2021).
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[68] Adam Liptak, "An Extraordinary Winning Streak for Religion at the Supreme Court," *The New York Times*, (2021).
[69] Lee Epstein and Eric A. Posner. "The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait." (unpublished manuscript, April 2021), typescript. Accessed April 2021.
[70] Epstein and Posner, 1.
[71] *Masterpiece Cakeshop v Colorado*, 584 U. S. ____ (2018).
[72] *Masterpiece Cakeshop v Colorado (2018)*, slip op, 1.
[73] *Espinoza v Montana Department of Revenue*, 591 U. S. ____ (2020).
[74] *Espinoza v Montana Department of Revenue (2020)*, slip op, 1.
[75] *Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania,* 591 U. S. ____ (2020).
[76] *Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania (2020)*, slip op, 6.
[77] *Burwell v Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[78] *Our Lady of Guadalupe School v Morrissey-Berru*, 591 U. S. ____ (2020).
[79] *Our Lady of Guadalupe School v Morrissey-Berru* (2020), slip op, 2.
[80] *Roman Catholic Diocese of Brooklyn v Cuomo*, 592 U. S. ____ (2020).
[81] *Tandon v Newsom*, 593 U. S. ___ (2021).
[82] *South Bay United Pentecostal Church v Newsom*, 141 S Ct 716 (2020); *South Bay United Pentecostal Church v Newsom*, 140 S Ct

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[83] Poe, 72 *Alabama Law Review*, 653.

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Rule of Law v Rule by Law: The Doomed Fate of Hong Kong's Autonomy

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Abstract

Under the system of "One Country, Two Systems," the dream that Hong Kong and its citizens could maintain the "high degree of autonomy" promised to them under the 1984 Sino-British Joint Declaration seemed possible. However, it was nothing more than a mirage. In fact, the Hong Kong Basic Law itself contains the means to undermine Hong Kong's autonomy. It stipulates that the Mainland government is allowed complete, unchecked oversight over Hong Kong's judicial and legal proceedings, as well as the ability to enact legislation without approval from the Hong Kong legislature in the name of national security. The passage of the Hong Kong National Security Law (NSL) in the summer of 2020 was the logical conclusion to years of encroachment on Hong Kong's judicial and legislative autonomy. Underneath the guise of China's "One Country, Two Systems" lies a story of two battling legal philosophies and the power dynamics that allowed one to prevail. This paper will explore these battling legal philosophies between Hong Kong and China to showcase the inherent weaknesses and naiveness of "One Country, Two Systems." In addition, this paper argues that although the passing of the NSL may mark the final death of Hong Kong's autonomy, it was never truly guaranteed under the Basic Law to begin with.

I. Introduction

In 1841, following an embarrassing defeat to Britain in the First Opium War, the Chinese government ceded the territory of Hong Kong to the British.[1] Once nothing more than a pile of rocks, Hong Kong society flourished under British rule. Citizens enjoyed a modernizing economy and basic fundamental rights such as freedom of speech, freedom of assembly, and an independent court system based on the rule of law. Under the leadership of Premier Deng Xiaoping and his "Opening up and Reform" (改革开放) policies of the 1980s, Mainland China grew more stable and economically prosperous. Following this growth, reclaiming Hong Kong seemed like the last step in regaining Chinese glory and erasing the years of "national humiliation" caused by devastating defeats in the Opium Wars and subsequent foreign imperialism. For the Mainland, reincorporating Hong Kong as Chinese territory was a priority not just because of the region's strategic importance in attracting more foreign direct investment for further economic development but also because it was a symbol of China's rise.

Therefore, for Deng Xiaoping, the question was not *whether* Hong Kong would be returned as Chinese territory but *when*. Yet China faced a dilemma: how to peacefully incorporate a territory whose citizens grew up with a capitalist economy and a strong belief in the protection of individual rights into a heavily monitored and controlled socialist state. "One Country, Two Systems" seemed to be the perfect compromise, where the PRC could reap both the economic and reputational benefits of overseeing Hong Kong's territory without domestic pushback.

Regaining control over Hong Kong may also set an enticing and reassuring example for Taiwan, a territory which the Mainland has hoped to "reunify" since its takeover by the *Kuomintang* (Nationalist Party) following the Chinese Civil War in 1949. This goal continues in China today, as evidenced by the current Chinese

President and Premier Xi Jinping's speech in 2019, in which he emphasized the Chinese government's commitment to incorporate the Taiwanese territory into the Mainland under "One Country, Two Systems."[2] This approach to reunification, in theory, would aid the Chinese government in consolidating land and power while also appeasing opposition in Taiwan.

Encouraged by the pending expiration of Britain's control over the Hong Kong territory, the PRC and the United Kingdom signed "The Sino-British Joint Declaration" on December 19, 1984; this declared that on July 1, 1997, Hong Kong would once again be considered a part of China.[3] The Joint Declaration guarantees that the newly established Hong Kong Special Administrative Region (HKSAR) will "enjoy a high degree of autonomy" for at least fifty years, with its own independent judiciary and legislative powers, and a "Basic Law" which would assure citizens' freedom of speech, expression, and assembly.[4] This agreement, along with the Basic Law, together constitute the legal embodiment of "One Country, Two Systems."

For a while, "One Country, Two Systems" seemed to be working. Hong Kong citizens continued to enjoy freedoms not granted to those in Mainland China, such as the freedom to protest the government and speak their minds with others and online, and the judicial system maintained its legitimacy and showed a strong commitment to the rule of law. However, the Basic Law itself contains the means to undermine Hong Kong's autonomy. Under the mirage of autonomy, the Basic Law stipulates that the Mainland government is allowed complete, unchecked oversight over Hong Kong's judicial and legal proceedings, as well as the ability to enact legislation without approval from the Hong Kong legislature in the name of national security.[5] Thus, the erosion of Hong Kong's autonomy had begun before the ink had even dried.

On June 30, 2020, the National People's Congress Standing Committee (NPCSC), the legislative body of the PRC government,

passed "the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region."[6] This new National Security Law (NSL) was the death knell for Hong Kong's autonomy. Passed in secret overnight, the NSL directly violates the freedoms and rights ensured to citizens through the Joint Declaration and Basic Law. Since its passing, the once-free press has faced harsh crackdowns, citizens have been arrested for trying to flee the territory,[7] and others have been arrested merely for rallying together in the name of democracy.[8] The promise of "One Country, Two Systems" no longer exists while Hong Kong ventures into a new stage in history under the PRC's tightening grip.

By analyzing both the years of PRC encroachment on Hong Kong's supposed independent judicial system and the culmination of this encroachment through the existing loopholes in the Basic Law and terms of the NSL, this paper will explore the battling legal philosophies between Hong Kong and China; this will ultimately showcase the inherent weaknesses and naiveness of "One Country, Two Systems." This paper argues that although the passing of the NSL may mark the final death of Hong Kong's autonomy, it was never truly guaranteed under the Basic Law to begin with. Rights enjoyed by those in Hong Kong were always at risk of being taken away at the discretion of the NPCSC, while the institutions that guarded these rights have slowly been hollowed out from the inside.

II. Legal Theory

To understand why the Mainland government's authority over Hong Kong doomed "One Country, Two Systems," it is important to first understand the legal philosophy behind lawmaking and judicial review. In general, most legal scholars, such as Professors Katherina Pistor and Chenggang Xu in the *Columbia Law Review*, believe that "law is inherently incomplete."[9] This means that when laws are written, they are unable to fully account for all potential contexts in

which they may later be applied. To address vagueness, most legal systems rely on "residual lawmaking power," which is the "power to interpret existing law, to adapt it to changing circumstances, and to extend its application to new cases."[10] In an ideal scenario, this power, often vested in a high-ranking judicial body, allows ambiguous statutes to be interpreted so that they may be clearly and justly applied to new contexts. Without safeguards to ensure that laws are reviewed and interpreted in good faith, however, this ambiguity leaves open the possibility "for people, including judges, to construct the law unevenly or in accordance with their own interests."[11] This is particularly relevant in China, where "Chinese statues and regulation are in certain respects characterized by intrinsic vagueness that communicates equivocal authority both to persons, whether legal or natural, and to the government."[12] This ambiguity grants Chinese leaders and legislative bodies flexibility to assert control over the judiciary and its decision-making processes.

When viewing the role of residual lawmaking power more broadly in democratic regimes versus authoritarian regimes, the key differences lie in each judicial body's commitment to the rule of law. The court system in Hong Kong, both through its established political culture and the Basic Law's promised independent judiciary, is modeled after the British common law system to uphold the "rule of law," which refers to "a courts' ability to make decisions without being subject to intervention."[13] It stands in stark contrast to the Chinese government's "rule by law" approach, which scholars argue is to "ensure that the law conforms to [Chinese officials'] policy choices."[14] In the battle between these two forms of legal philosophy, the PRC will always win in the end. This is because the PRC holds what Thomas Hobbes refers to in Leviathan as the power of "the sword," which manifests itself in the PRC's complete power over HKSAR's judicial review process and legislative agenda in times of "national emergency," as afforded by the Basic Law. As Hobbes writes, "covenants, without the sword, are but words,

and of no strength to secure a man at all."[15] The following sections will outline the key differences between these two conflicting legal philosophies and explain the power of China's authoritarian rule over Hong Kong.

A. What is the Common Law? A Look into Hong Kong's Commitment to the Rule of Law

Hong Kong-based attorney Karmen Kam notes in the Brooklyn Journal of International Law that the distinct tension between Hong Kong's "common law" system and Beijing's authoritarian rule, "[a]t its most fundamental, is the rule of law versus the rule by law."[16] Similarly, Tom Schneider writes that "the most basic legal split between Hong Kong and China" is "their contrasting theories of what the law is."[17] Therefore, it is important to analyze the differences between Hong Kong's legal system, which is based on British legal tradition, and the Chinese government's legal system, which is closely tied to the central government.

In British legal philosophy, a law is viewed as "a rule of conduct which the state prescribes and enforces on its subjects."[18] In a state built on the understanding that "the will of the people will always prevail," the common law is based on the idea that the legislature governs "to assert, maintain, and promote the overriding claims of the community as a whole."[19] As a British territory, Hong Kong's court system was built after the British model, with a commitment to "common law" principles, such as individual freedoms, and upholding "the rule of law."

After the handover to China, the Basic Law stipulates that this commitment to the common law and the related legislation already passed in the region at the time of transition shall be upheld. In addition, the Basic Law incorporates many rights enjoyed under British common law, such as in Article 27, which states, "Hong Kong residents shall have freedom of speech, of the press and

publication; freedom of association, of assembly, of profession and of demonstration; and the right and freedom to form and join trade unions, and to strike."[20] To safeguard the common law and promote the rule of law, Chapter II, Article 19 of the Basic Law establishes that "the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication."[21] The independent judiciary, and subsequently the power of independent judicial review, is a key component in ensuring the rule of law.[22] It is also critical to ensuring the HKSAR's "high degree of autonomy" promised under the Joint Declaration.[23] Led by the independent judiciary, Article 82 of the Basic Law grants final adjudication to "the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal."[24] Similarly, in Article 84, the Basic Law states that in adjudicating cases, the courts "may refer to precedents of other common law jurisdictions."[25]

The rule of law asserts that the legal system is bound by the common law in interpreting and deciding cases. Article 11 of the Basic Law guarantees that the freedoms outlined in the Law must be protected under the rule of law. It states, "the systems and policies practiced in the Hong Kong Special Administrative Region . . . shall be based on the provisions of this Law. No Law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."[26] Therefore, when cases are tried in front of the Hong Kong Court of Final Appeal or lower-level appellate courts, the court must rely on the provisions of the Basic Law to decide the outcomes. Although a point of constant conflict and debate in such systems, in theory, institutions guided by the rule of law are informed by precedent and a commitment to upholding fundamental freedoms throughout the judicial process. Additionally, political institutions are barred from using the court system as a legislative tool to further the regime's agenda.

B. What Does Rule by Law Mean in China: A Look into the Chinese Legal System

In contrast to the notion of the rule of law, "rule by law" allows the government to interfere in the affairs of the court system, and thus is typical among authoritarian regimes. Without an independent judiciary, these regimes are not bound by the law of the land and can easily influence the decisions and interpretations of the courts for political purposes.

This is the case in the PRC, where legislation passed by the National People's Congress is "not subject to challenge or veto by any other [state] organ."[27] Therefore, although "China also has a judiciary, including a Supreme Court, Chinese courts cannot review legislation to ensure conformity with the Constitution."[28] In fact, Article 67 of the PRC's Constitution grants the National People's Congress direct oversight over the Supreme People's Court and its subsidiary bodies, thus legally allowing the legislative body to interfere in court affairs whenever it sees fit.[29]

Despite a lack of practice, the Chinese government has found use in promoting the "rule of law" in its rhetoric. In their book entitled, "The Rule of Law: The Politics of Courts in Authoritarian Regimes," scholars Tom Ginsburg and Tamir Moustafa argue that "Mao Zedong almost completely undermined judicial institutions after founding the People's Republic of China in 1949, but rule-of-law rhetoric is being increasingly used by the regime to distance itself from the spectacular excesses and failures of its past and to build a new legitimizing ideology."[30] Promoting the rule of law while practicing rule by law is thus a political tactic used to legitimize authoritarian rule. In fact, the notion of a difference between "rule of law" and "rule by law" does not even exist within the Chinese legal system or the Chinese language. If one were to translate "rule of law" into Chinese, for example, the corresponding term "*fazhi* (法制)" could also be interpreted as meaning "rule by law."[31]

Without institutional checks or assurance of an independent judiciary in the PRC, the governing regime can easily manipulate the role of the Mainland courts for political gain. Cora Chan, the Deputy Head of the Department of Law at the University of Hong Kong, writes that "[t]he NPCSC does not have a principled approach to interpreting the law. In line with Leninist legal tradition, the law is viewed by the Chinese government as a mere tool to facilitate Party agenda."[32] Ginsburg and Moustafa view this as the "judicialization of politics,"[33] which they argue poses a major threat to the actual "rule of law" around the world.

III. The Tension Between "Rule of Law" and "Rule by Law"

The unique tension between Hong Kong and the PRC's legal systems has shown to have real-world consequences. Han Zhu noted in early 2019 that "[t]he sub-indicator of the World Justice Project (WJP) rule of law index shows that fundamental rights in Hong Kong have obviously deteriorated since 2011."[34] The consequences of this tension have also resulted in the weakening of Hong Kong's legal system. In addition to awarding the power of final adjudication to the NPCSC, the Basic Law stipulates that "[t] he state institutions of the People's Republic of China shall practice the principles of democratic centralism," which in practice means that "all administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people's congresses and shall be responsible to them and subject to their oversight."[35] This term of the Basic Law grants the authoritarian NPCSC and similar Mainland legislative institutions full oversight and control over Hong Kong's judiciary. Attorney Karmen Kam, a close observer of the Hong Kong-PRC legal relationship, argues that the Basic Law thus "recognizes and preserves the internal differences of the two legal systems, but it lacks an institutional structure to generate positive consensus between both sides, and particularly, to restrain

Chinese authorities from possible interference."[36] The result of these terms, according to Hualing Fu, a law professor at the University of Hong Kong, is that "Hong Kong can enjoy separate systems, the rule of law, [and] human rights protection, only to the extent that the Chinese Government exercises restraint not to tarnish them."[37] The Basic Law goes beyond failing to protect Hong Kong's judicial autonomy; it empowers the Mainland government to influence and control Hong Kong's supposedly autonomous system whenever it sees fit. Two main forms of "oversight" from the Basic Law are important for the analysis herein: the NPCSC's right to issue final interpretations of the law and the NPCSC's ability to enact laws to protect Hong Kong in cases of national emergency.[38]

IV. The Issue of Interpretation

Although Article 19 of the Basic Law appears to establish Hong Kong's independent judiciary, Article 158 contradictorily affirms that "[t]he power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress."[39] According to the Basic Law, the NPCSC can only assert this power when the Court of Final Appeal (CFA) seeks such an interpretation "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region."[40] However, as Fu points out, "in practice . . . Article 158 . . . has been read to confer on the NPCSC a plenary and freestanding power of interpretation: it could issue an interpretation any time, with or without reference from Hong Kong institutions, and on any provision of the Basic Law."[41] After the NPCSC issues an interpretation, the Hong Kong regional courts are forced to "follow the interpretation of the Standing Committee"[42] with no path, legal or otherwise, to challenge it. Accordingly, legal scholar Xiaonan Yang believes that "[f]or the NPCSC, the interpretation of the [Basic Law] is the most powerful and effective

tool to exercise the powers of sovereignty."[43] The following sections will illustrate how the PRC asserts its control over Hong Kong's judicial autonomy by describing four significant court cases that involve the NPCSC's interpretations of the Basic Law.

A. Ng Ka Ling v Director of Immigration (1998)

Ng Ka Ling v Director of Immigration (1998), which is most often referred to as the "Right of Abode" case, is the first and most prominent example of the NPCSC using its power to interpret the Basic Law to exercise control over Hong Kong's legal proceedings. [44] This case involves multiple children who were born in Mainland China but whose parents are native to Hong Kong. After the children's attempt to gain residency in Hong Kong was rejected, the families appealed for judicial review, citing the "right of abode" enshrined in Article 24 of the Basic Law.[45] Article 24 states that Chinese nationals born outside Hong Kong whose parents were either born in Hong Kong or resided in Hong Kong for at least seven years qualify for permanent residency.[46] The families challenged two ordinances of the HKSAR's harsh immigration policy, which rejected citizenship claims from children of HKSAR residents, by claiming that these ordinances contradicted Article 24 and violated the International Covenant on Civil and Political Rights (ICCPR).[47]

The Right of Abode case may come to hold important legal, social, and economic significance for the HKSAR. If the CFA ruled in favor of the families challenging the immigration policy, the court could, as Kam writes, "open the doors to up to 1.67 million Mainland immigrants over the next decade."[48] From the perspective of the Hong Kong government, allowing so many immigrants to claim permanent residence status would place a serious strain on the educational, economic, housing, and social service resources of the newly incorporated territory.[49] Notably, the case was also one of the first high-profile cases tried in front of the CFA following the

handover from Britain and would establish an important precedent on the court's autonomy going forward.

The CFA ultimately ruled in favor of the families, citing other common law jurisdictions agreeing with their claim that certain immigration ordinances violated the Basic Law. It was adamant that, per Article 158 of the Basic Law (the "interpretation clause"), the "right of abode" was a domestic issue under the Hong Kong court system's sole jurisdiction.[50] This bold ruling enraged many Hong Kong government officials, including the Chief Executive, who ultimately circumvented the CFA to appeal directly to the NPCSC for an interpretation of the law.[51]

On June 26, 1999, the NPCSC declared the CFA ruling invalid and "not consistent with the legislative intent"[52] of the Basic Law. The interpretation did not invalidate the *Ng Ka Ling* ruling, but instead would be applied to all future cases related to the matter. The NPCSC further claimed that the CFA violated Article 158 of the Basic Law by failing to seek an interpretation from the NPCSC. The CFA responded in another opinion, in which it conceded that it "accepts that it cannot question the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."[53] Although the CFA initially attempted to stand up for its autonomy, the NPCSC successfully asserted its influence and opened the door for further encroachment on Hong Kong's legal affairs.

B. Lau Kong Yun v Director of Immigration (1999)

Lau Kong Yun v Director of Immigration (1999) involves seventeen mainland-born children who claimed to be children of Hong Kong permanent residents but had overstayed their visas, once again tasking the CFA with interpreting the "right of abode" provision of the Basic Law. The ultimate decision-making process

in this case does not involve a new NPCSC interpretation. Instead, the significance of this case is that it brings into question the legality of the NPCSC's issuance of an interpretation without request from the CFA in the *Ng Ka Ling* case. Additionally, the *Lau Kong Yun* case challenges the effect of the NPCSC's interpretation from the *Ng Ka Ling* (herein, "The Interpretation").[54]

The *Lau Kong Yun* case was the first major challenge to any NPCSC interpretation. To the surprise of many, the CFA ruled along the lines of the original *Ng Ka Ling* case by claiming that the immigration ordinances that the NPCSC tried to uphold in the Interpretation could still be deemed unconstitutional because of the ambiguity in its language.[55] In deciding the case, the CFA again opted not to seek clarification from the NPCSC. Therefore, although The Interpretation criticized the CFA for failing to seek an interpretation previously, it did not lay out clear terms for when the CFA must do so. In addition, the Interpretation did not contain any clear measures for ensuring that the CFA would comply with its terms and the NPCSC's expectations in the future.[56]

Many laud *Lau Kong Yun* as a brave effort on the part of the CFA to "fashion . . . a mechanism for resisting the NPCSC's authority."[57] In other terms, the CFA attempted to establish institutional resistance to the PRC's oversight powers. However, Justice Anthony Mason's opinion explicitly recognizes the NPCSC's power over the Hong Kong judiciary, thus opening the door for further encroachment. Justice Mason points out the unique "link" between Hong Kong and the Mainland's contrasting judicial systems under "One Country, Two Systems." In doing so, Mason recognizes that, per the PRC Constitution and Article 158 of The Basic Law, "the NPC is the highest organ of state power and the NPCSC is its permanent body."[58] He concedes that "the power of interpretation enjoyed by the courts of the Region is limited . . . and differs from the general and free-standing power of the interpretation enjoyed by the Standing Committee"[59] Justice Mason thus admitted, in describing

NPCSC interpretations as "free-standing," that the NPCSC "could do so on its own initiative" without need for a reference or request from the CFA.[60] This acknowledgment of the NPCSC's ultimate power over the Hong Kong court system would prove to have far-reaching consequences for Hong Kong's judicial autonomy.

C. Democratic Republic of Congo v FG Hemisphere Associates LLC (2011)

In Democratic Republic of Congo v FG Hemisphere Associates LLC (2011), the Hong Kong court system found itself the arbiter of a dispute between a private company, FG Hemisphere, and the government of the Democratic Republic of Congo regarding property rights in Hong Kong.[61] FG Hemisphere, a debt collection company, attempted to seize Congolese government property located in Hong Kong to settle the government's debt. Initially, FG Hemispheres was successful in blocking Congo from receiving payments generated by the property. However, Congo quickly challenged the decision in the Hong Kong lower courts by claiming that, as a sovereign nation, it had "absolute immunity" in international commercial litigation.[62] Elizabeth Chan, a former law professor at the University of Auckland and current associate specializing in international commercial law, explains that absolute immunity "derives from the concept of equality among states" and implies that "the acts of one state should not be questioned by the courts of another."[63] However, the contrasting legal concept of "restrictive immunity" means states cannot claim immunity if they have, in fact, violated a commercial agreement or liability.[64]

The CFA faced an important question: is the issue of "state immunity" related to domestic or foreign affairs? Articles 13 and 19 of the Basic Law restrict the Hong Kong legislative or judicial bodies from having "jurisdiction over acts of state such as defense and foreign affairs.[65] The CFA decided that the issue of "state

immunity" involved foreign affairs, and therefore it was bound by Article 158 of the Basic Law to request an interpretation from the NPCSC. The interpretation issued by the NPCSC proclaimed that "[t]he Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region."[66] Therefore the CFA's final decision was consistent with the PRC's policy on state immunity, granting the Congolese government absolute immunity in the case. This case was the first and only time that the CFA officially requested an interpretation from the NPCSC. The request further undermined the judicial autonomy of the Hong Kong courts, but this time it was by the court's own doing.[67]

D. The Chief Executive of the HKSAR and another v Yau Wai Ching and others (2016)

In this highly politicized legal battle, two newly elected members of the Hong Kong Legislative Council, Yau Wai Ching and Sixtus Leung Chung Hang, were removed from their positions after refusing to properly recite the "Legislative Oath," a tradition required under Article 104 of the Basic Law.[68] Both Ching and Hang, who are members of the Youngspiration Party, recited a modified version of the oath in which they declared their allegiance to "The Hong Kong Nation," rather than to "The Hong Kong Special Administrative Region of the People's Republic of China."[69] They also used a derogatory pronunciation of "China" and displayed a blue banner with the text, "HONG KONG IS NOT CHINA."[70] Breaking with previous tradition, the NPCSC issued an interpretation without request by the CFA or any Hong Kong governing body and *before* the CFA had released a judgment on the case. The NPCSC announced this interpretation only one day after the CFA received a formal request for review from Hong Kong's then-Chief Executive, Leung Chun-ying.[71]

The NPCSC's interpretation of Article 104 of the Basic Law states that "an oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law."[72] The NPCSC's decision to issue an interpretation, seemingly with the intent to influence the outcome of the case, constituted its most aggressive infringement on Hong Kong's judicial autonomy to date. In addition, this interpretation showcased the NPCSC's willingness to issue interpretations that, in effect, add amendments to the Basic Law rather than clarify its pre-existing content.[73] Alvin Cheung, a former barrister[74] in Hong Kong and current postdoctoral research fellow at McGill University, stated in an interview that the NPCSC's attempt to dictate the outcome of a domestic case "cannot be accept[ed] if the Hong Kong Courts are to hold any role."[75] However, as law professor Cora Chan points out, the checks necessary to maintain the independence of the Hong Kong court system simply do not exist. She writes, "The anxiety surrounding the prospect of the NPCSC using its nuclear powers of interpretation to 'settle' the pro-independence saga reveals the fragile foundation of Hong Kong's constitutional order: the highest decision-maker is not subject to legal controls."[76]

These four cases are not an exhaustive list. The NPCSC issued interpretations of the Basic Law in two other instances: once in 2004 on the topic of universal suffrage (similar to *The Chief Executive of the HKSAR case*, the NPCSC issued a ruling which critics say serves as an amendment to the Basic Law rather than an interpretation)[77] and once in 2005 regarding the Chief Executive (similar to *Ng La King* in 1999, this interpretation was issued at the request of the Hong Kong government, not by the CFA).[78] From contradicting CFA rulings to preemptively issuing rulings to influence CFA decisions, the NPCSC has slowly eroded Hong Kong's judicial independence and made an increasingly aggressive effort of Mainland bodies to interfere in Hong Kong's domestic affairs.

V. In Times of National Emergency

In addition to vesting the power of interpretation in the NPCSC, the Basic Law offers the NPSCS and other Mainland governing bodies another "loophole" to undermine Hong Kong's autonomy. In instances of a threat to national unity or security, or in a "state of emergency," the Basic Law under Article 18 allows the NPCSC the power to "issue an order applying the relevant national laws in the region." Without clearly defining "threat to national security," this statute grants the NPCSC the ability to pass legislation it deems "necessary." There are no checks on this power, clear stipulations for its use, or domestic avenues to challenge the fallout when the power is exercised.

Historically, the PRC's intervention in Hong Kong's legal enactments has triggered strong opposition and mass social movements. In 2003, over 500,000 people protested the HKSAR's implementation of Basic Law Article 23,[79] which refers to the HKSAR's legislative duty "to prohibit any act of treason, secession, sedition, subversion against the Central People's Government."[80] In 2014, pro-independence activism in Hong Kong gained international recognition through the "Umbrella Movement," often lauded as one of the most influential and captivating protest movements against authoritarian encroachment of the twenty-first century.[81] This protest movement was in response to the National Congress of the Communist Party of China's (NCCPC) attempt to interfere in the then-upcoming 2017 election of the Hong Kong Chief Executive.[82] More recently, in 2019, millions flooded the streets of Hong Kong in opposition to a proposed extradition bill that would allow anyone in Hong Kong accused of certain crimes to be extradited to other countries—including Mainland China.[83] These protests ostensibly played a critical role in the PRC's decision to issue the NSL.

VI. The Death of "One Country, Two Systems"

The Chinese government issued the NSL on June 30, 2020, without any notice to Hong Kong's legislature or people. The terms ambiguously ban all forms of "secession, subversion, organization and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security."[84]

Legal scholars at Human Rights in China (HRIC) believe that "the pronouncement of the 'death' of Hong Kong and the rule of law remains a premature conclusion,"[85] citing the resilience and strength of the Hong Kong people. However, many political leaders and activists around the world have been quick to declare the NSL as marking the death of "One Country, Two Systems." During a Committee on Foreign Affairs meeting on July 1, 2020, Nathan Law, a prominent student activist in Hong Kong, spoke to members of U.S. Congress, asserting that "Through fear, intimidation, and heavy-handed governance, Beijing turned Hong Kong into just another Chinese city while trying to keep its outer shell. . . . The 'high degree of autonomy' once promised is just another blatant lie."[86] Carole J. Peterson, a constitutional law expert at the University of Hawaii, offers a similar point of view, claiming that "foreign governments are justified in concluding that Hong Kong is no longer operating a truly separate legal system from Mainland China."[87] Allegedly passed "in accordance with . . . the Basic Law," the NSL actually violates fundamental common law principles and the Sino-British Joint Declaration of 1984 and limits Hong Kong's judicial authority. As the following sections will show, although these violations are clear, international regulation is weak in responding with consequences and forcing compliance.

A. Violation of Common Law Principles

Article 4 of the NSL purportedly protects "the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration."[88] Events in Hong Kong following the law's passing demonstrate that while this rhetoric may professedly uphold the "rule of law," it is in fact driven by "rule by law" tactics. Threats against a free press became most apparent following the swift arrest of Jimmy Lai, founder of the Hong Kong-based pro-democracy news source "Apple Daily," alongside many other top media executives for allegedly "colluding with foreign powers."[89] Pro-democracy activists also became targets of intense police raids and arrests. In one instance, a man on the street was arrested for holding a pro-democracy flag. In another, 360 citizens were arrested for attending a pro-democracy rally.[90] Under Xi Jinping, the Communist Party has evidently been afraid of public opinion on the Mainland and is using the new national security law to try to smash Hong Kong's independent voices and settle scores with longtime critics."[91] In whole, the PRC government's suppression of free speech is motivated by the threats that both civil unrest and grassroots protest movements pose to the PRC's consolidation of power over Hong Kong.

Furthermore, Beijing's grip on Hong Kong is becoming so tight that it may be increasingly difficult for residents to leave. For example, a group of Hong Kong residents and activists, now referred to as "The Hong Kong 12," were arrested in August for attempting to flee the country by boat for Taiwan.[92] It is currently unclear whether they will be tried for attempting to illegally cross the border in a mainland or Hong Kong court, which despite its compromised nature, is still in theory committed to the rule of law. Spokeswoman for the U.S. State Department Morgan Ortega expressed her concern for the "deterioration of human rights in Hong Kong," writing that "Legitimate governments do not need to wall their countries in and

prevent their citizens from leaving."[93]

From an outside perspective, the NSL's most harrowing aspect is its global scope. Article 38 of the NSL states that "This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region."[94] Therefore, regardless of citizenship or residency, anyone is subject to be tried under the NSL for any act which somehow threatens Hong Kong's national security. Although this statute has yet to be invoked, Alvin Cheung emphasizes that, in regard to the NSL, "there is no limit."[95]

B. Violation of the Joint Declaration

Besides breaching Hong Kong's "high degree of autonomy" promised under the Joint Declaration, the NSL violates the provisions of the International Covenant on Civil and Political Rights (ICCPR).[96] The ICCPR, an international treaty, asserts that "in recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[97] The Joint Declaration and Article 39 of the HKSAR Basic Law reaffirm the HKSAR's commitment to the provisions of the ICCPR. Although the PRC has not ratified the document and is subsequently not technically bound by its provisions, it did sign the treaty in 1998,[98] thus committing to "an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty."[99] While the NSL claims in writing that "human rights shall be respected" and explicitly recognizes Hong Kong's commitment to the ICCPR, the terms of the law and their practical application act in direct violation of this international covenant by suppressing inalienable rights, subverting the rule of law, and trampling on Hong Kong's judicial independence.

C. Infringement on Judicial Authority

The NSL poses further infringements on Hong Kong's judicial authority by establishing four new governmental bodies that are not subject to the Hong Kong courts: The Office for Safeguarding National Security (OSNS), The Committee for Safeguarding National Security (CSNS), The Department for Safeguarding National Security of the Hong Kong Police Force (DSNS), and The Specialised National Security Crimes Prosecution Division of the Department of Justice (SPD).[100] In their white paper on the law, HRIC writes that these new forms of oversight "allow Beijing to assert direct and indirect control over all national security—from policy to investigation to prosecution and adjudication—in Hong Kong."[101] The OSNS, for example, is directed to "assume primary responsibility for safeguarding national security in the Region" and is held accountable by the Chinese government and subject to its supervision.[102] The NSL also stipulates that "the acts performed in the course of duty by the [OSNS] . . . shall not be subject to the jurisdiction" of the HKSAR.[103] Similarly, according to Article 14 of the NSL, "no institution, organisation, or individual in the Region shall interfere with the work of the [CSNS]," and all decisions made by the CSNS "shall not be amenable to judicial review."[104] The SPD is in charge of investigating and conducting arrests of all matters related to national security in Hong Kong. The DSNS holds the power to prosecute all cases related to national security, and "the prosecutors of this division shall be appointed by the Secretary for Justice after obtaining the consent of the Committee for Safeguarding National Security."[105] Additionally, the NSL does not allow for legal recourse to challenge the activities of these committees regardless of their violations of the Basic Law.

The NSL also states that the HKSAR courts will "have jurisdiction over cases concerning offenses under this Law," except in cases involving a foreign country, a "serious situation" that harms

the region's ability to try the case, or "an imminent threat to national security."[106] Given these exceptions' vagueness, it is unclear how much of the HKSAR court's jurisdiction has been eliminated.

VII. Implications and Conclusions

By taking advantage of "loopholes" in the Basic Law, such as utilizing its power of interpretation and enacting laws in the name of national security, the PRC government has systematically dismantled the institutions that protect Hong Kong's autonomy. Since the enactment of the NSL, the fate of "One Country, Two Systems" has been sealed. Any hope that Hong Kong could retain its status as a common law territory committed to protecting individual freedoms and human rights is all but lost.

In a speech to US legislators after the NSL's enactment, Cheuk Yan Lee, the General Secretary of the Hong Kong Confederation of Trade Unions, stated that "The new law just promulgated 11 p.m. 30th June 2020 is a complete destruction of the rule of law in Hong Kong and threatens every aspect of freedom the people of Hong Kong enjoyed under the international human rights standards or the Basic Law."[107] As predicted, the PRC has used the law to strip away citizens' independence. On November 11, 2020, the Chinese government forcibly removed four pro-democracy legislatures from the Legislative Council, which, in turn, prompted the fifteen remaining members of their bloc to step down in solidarity.[108] The *New York Times* reported the move as a deliberate effort by the PRC to "quash one of the last vestiges of democracy and dissent in Hong Kong."[109] From this point on, Hong Kong essentially resembles any Chinese city, a sign which Alvin Cheung says is the true signal that "One Country, Two Systems" is officially dead.[110]

Beijing's crackdown on Hong Kong has only increased Taiwan's reluctance to enter into its own iteration of "One Country, Two Systems." In September of 2020, the president of Taiwan

called upon all democratic nations to stand up against "aggressive actions" threatening freedoms, clearly targeting Beijing's behavior in Hong Kong.[111] In addition, Beijing's increasingly combative military posture on China's southern border has sparked fear of the potential for renewed military conflict. Michael Beckley in Foreign Policy Magazine declared the PRC's recent actions to be "the most provocative and sustained show of force in the Taiwan Strait in nearly a quarter-century."[112]

As the international community grieves the death of the rule of law in Hong Kong, it must not lose sight of the most important task at hand: protecting human rights. For the United States—a country that prides itself in its commitment to upholding international human rights standards—its leaders and officials in the Biden administration must make human rights a major priority in all future bilateral and multilateral discussions with China. This seems plausible, especially given the recent statement that Joe Biden's Senior Advisor on Asia Policy, Kurt Campbell, made in *Foreign Affairs* that the Trump administration "was cavalier about support for democracy and human rights in ways that weakened the United States' natural partners and emboldened Chinese authorities in Hong Kong and Xinjiang."[113] Pursuing this path, however, will require the United States to strengthen the relationships with key regional allies that were tarnished in the Trump era.

Alvin Cheung believes that to save Hong Kong, foreign nations must focus on playing "the long game."[114] He states that utilizing the United Nations' periodic review process on human rights may force the PRC to disclose instances of human rights violations and force compliance from international pressure. Similarly, HRIC notes that an institutionalist approach that emphasizes the enforcement of the ICCPR may be one of the only effective means to keep the PRC in check. Given that the PRC is a signatory of the treaty that Hong Kong has both signed and ratified, they write, China "is obligated under international law to not take any actions

that would defeat the object and purpose of the treaty."[115] Even if cases related to the NSL were tried in Mainland courts, "Mainland prosecutors and judges . . . in accordance with Mainland criminal procedure law, would also need to apply ICCPR standards."[116] The challenge ahead for nations such as the United States, however, is that enforcement of these standards will require partnering with regional allies to utilize both economic and political means to deter further mainland encroachment on Hong Kong.

The restoration of human rights in Hong Kong will unfortunately not happen overnight. The path for nations committed to protecting freedom and human rights in Hong Kong remains long and arduous, but to echo Nathan Law, "we shall continue to fight on."[117]

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