



— LEGAL POLICY FOCUS —

Sex is Better Than Gender

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What You Should Know

‘Gender’ is not a synonym for ‘sex.’ ‘Sex’ is a scientific term that refers to either of the two categories of individuals (male or female) that occur in many species. ‘Gender’ is a term borrowed from grammar that refers to cultural expectations regarding females and males. ‘Gender identity’ is a subjective term that refers to how a person perceives him- or herself.

Why You Should Care

- **It is becoming increasingly difficult to speak about women and women’s rights in a common language.** Today, science deniers refuse to acknowledge the biological basis of womanhood and are deliberately attempting to decouple the legal meaning of ‘sex’ from biology. Conflating ‘sex’ with ‘gender’ opens the door to inaccurate claims that sex is neither objective nor fixed.
- **Inaccurate terminology undermines scientific research and data collection.** When we say that ‘sex’ is the same as ‘gender,’ we undermine the validity of data regarding public health, medicine, education, crime, and the economic status of women.
- **We can’t fight sex discrimination if we can’t define sex.**¹ Using ‘sex’ and ‘gender’ as synonyms creates a misperception that laws intended to prohibit sex discrimination require businesses, schools, and public facilities to allow biological males to self-identify into women’s private spaces (shelters, dorm rooms, prisons, hospital rooms, etc). It also opens the door for males to take athletic, educational, and professional opportunities from females.

¹ KARA DANSKY, THE ABOLITION OF SEX: HOW THE ‘TRANSGENDER’ AGENDA HARMS WOMEN AND GIRLS at 8.

What is a Woman?

On day two of her Supreme Court confirmation hearing, in response to questioning from Sen. Marsha Blackburn (R-TN), then-Judge Ketanji Brown Jackson told the country that she could not define the word “woman” because she is “not a biologist.”²

Most dictionaries, which are not written by biologists, define woman as “an adult female human being.” So what, then, is a female? A female is an individual of the sex that produces ova and bears young.³ Of course, not all women produce ova or bear young, but only a female body is capable of doing so.

These have been the accepted definitions of the words ‘woman’ and ‘female’ since anyone can remember. But Judge Jackson would not commit to these previously uncontroversial notions.

Let’s Talk About ‘Sex’

‘**Sex**’ refers to either of the two categories of individuals (male or female) that occur in many species for distinct reproductive purposes.⁴ It is an immutable trait that is biologically determined. Sex is objective and fixed. It is stamped in every cell of our bodies and cannot be changed.

‘**Gender**,’ by contrast, is a term that gained currency among feminist theorists in the 1970s as a way to distinguish biology from cultural expectations about sex roles. Feminist theorists sought to eliminate ‘**gender stereotypes**’ (such as the idea that women should be homemakers while men should be breadwinners) and fought to dismantle cultural norms regarding masculinity and femininity (*i.e.*, a girl who likes sports is a “Tom Boy”). These feminist theorists argued that a person’s biological sex is not (and should not be considered to be) determinative of that person’s interests, style of dress, occupation, or

² The question posed by Senator Blackburn did not, as some commentators have suggested, come out of left field. It was a follow-up to another question about the late Justice Ruth Bader Ginsburg’s statement in *U.S. v. Virginia* that men and women are not “fungible” and that physical differences between the sexes “are enduring.” 518 U.S. 515, 533 (1996).

³ Despite the common scientific usage of the word ‘female,’ since 2020 the Merriam-Webster dictionary has included a **second definition**: “*having a gender identity that is the opposite of male.*” But, of course, identifying as something other than male does not make one female. Moreover, it should be noted that Merriam-Webster’s second definition is incredibly sexist, defining female, not as something distinct and unique, but only in opposition to that which is male.

⁴ A tiny percentage of humans (**between .02 and .1%**) are born with chromosomal abnormalities or with reproductive organs and genitals that developed differently than most other people of their sex. Once referred to as ‘intersex,’ individuals with differences of sexual development (or DSD conditions) do not contradict the sex binary anymore than a people who were born without an arm contradict the fact that human beings are two-armed mammals. People with DSD conditions are not a third sex, and they are not ‘transgender.’ They are a variation on the sex binary, the exception that proves the rule.

role in society. Today, the word ‘gender’ is a sociological or anthropological term that refers to social norms regarding male and female behavior, appearance, interests, and lifestyle. In other words, “gender is to sex as feminine is to female and masculine to male.”⁵

“
**Woman =
Adult Human Female**
”

‘**Gender identity**’ is a term that is closely related to ‘gender.’ It refers to a person’s subjective feelings about his or her own masculinity or femininity and about how that person would like to be identified by society.⁶ According to a 2017 Obama-era federal regulation, ‘gender identity’ is “an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth.”⁷

American Anti-Discrimination Law

A number of American laws prohibit sex discrimination. **Title IX of the Education Amendments**, for example, prohibits recipients of federal funding, such as primary and secondary schools as well as colleges and universities, from discriminating *on the basis of sex*. **Title VII of the Civil Rights Act of 1964** prohibits employers from discriminating *because of sex*.

For its part, the **14th Amendment** of the United States Constitution forbids government from denying “equal protection of the laws.” Courts have interpreted this to mean that the government may not treat men and women differently unless there is an important public interest at stake (such as safety or privacy).⁸ Even then, any differential treatment of males and females must be substantially related to supporting the particular interest.⁹

⁵ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994)(Scalia, J., dissenting).

⁶ A ‘trans-identified’ individual (commonly referred to as ‘transgender’ or simply ‘trans’) is someone whose gender identity does not align with his or her sex. Trans-identified individuals usually attempt to present and live as the sex with which they identify. However, some trans-identified people do not take steps to present as something different from their birth sex. According to the website **Transequality.org**, “[b]eing transgender means different things to different people . . . [T]here’s no one way to be transgender, and no one way for transgender people to look or feel about themselves.”

⁷ 45 C.F.R. § 92.4.

⁸ See *e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (a state statute preferring males to females in estate administration violates the Constitution’s guarantee of equal protection); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (benefits given by the United States military to the family of service members cannot be given out differently on the basis of sex); *Orr v. Orr*, 440 U.S. 268 (1979) (a state cannot require husbands, but not wives, to pay alimony upon divorce); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (workers’ compensation laws may not automatically grant death benefits to widows but not widowers); *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute may not admit only male applicants).

⁹ *Craig v. Boren*, 429 U.S. 190 (1976) (government policies that differentiate on the basis of sex are constitutional if “substantially related” to the achievement of “important governmental objectives”).

Federal prohibitions against sex discrimination are based on the fundamental premise that it is wrong to deny someone opportunities or benefits on the basis of irrelevant immutable traits. Courts interpreting federal mandates against sex discrimination have, therefore, generally interpreted such laws as prohibiting unfair disparate treatment of similarly situated males and females—not as prohibiting all policies that separate or distinguish between males and females on the basis of relevant biological differences.

As Justice Ruth Bader Ginsburg explained in *United States v. Virginia*, “[i]nherent differences’ between men and women . . . remain a cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”¹⁰ In other words, while American

law forbids sex-based classifications that “create or perpetuate the legal, social, and economic inferiority of women,”¹¹ the law is not sex-blind and does not forbid sex-based classifications that are based on actual relevant differences.

“
Not all women produce ova or bear young. But only a female body is capable of doing so.
”

Sex v. Gender

Substituting the term ‘gender discrimination’ for ‘sex discrimination’ undermines these foundational principles of the law of sex discrimination, allowing institutions to divide people on the basis of subjective criteria (such as identity) but not on the basis of relevant objective criteria (such as biology). How did we let this happen?

A. Postmodernism

The attack on the basic meaning of words is not new. It began decades ago with the rise of postmodernism, which posits that there is no objective truth, only subjective experience and hierarchies of power.¹² As Helen Pluckrose and James Lindsay explain in their book *Cynical Theories*, postmodernists believe that language is a tool of oppression. The goal of postmodernism, therefore, is to ‘deconstruct’ language by exposing the way in which words reinforce a culture’s power structures.¹³

Postmodernists generally regard ‘gender’ (*i.e.*, sex roles) as culturally constructed and oppressive. But some postmodernists go further, arguing that even biological sex is

¹⁰ 518 U.S. at 534.

¹¹ *Id.*

¹² See HELEN PLUCKROSE & JAMES LINDSAY, *CYNICAL THEORIES* 31 (2020).

¹³ *Id.* at 39-40.

a set of meaningless linguistic categories established for the purpose of dividing and excluding people.¹⁴ In short, as Pluckrose and Lindsay explain, “deconstruction in its purest form [does] not allow the category of ‘woman’ to exist at all.”¹⁵

It is, of course, easy to dismiss all of this as just a bunch of intellectual gobbledygook from a graduate-level philosophy class. And, indeed, had all of this stayed in the ivory tower, it would be little cause for concern. But what began as an analytic framework has, in recent years, seeped into our public discourse and today threatens to infect public policy and the entire edifice of American law.

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*It is wrong to deny
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”

B. Inadvertent misuse / squeamishness

Unfortunately, the postmodern attack on meaning may have found an inadvertent ally in the American public’s squeamishness about the word ‘sex,’ which can also refer to intercourse. The result has been that the public is all too amenable to substituting the word ‘gender’ for the more provocative term ‘sex.’¹⁶

A scene in *On the Basis of Sex*, a movie about the early career of the late Justice Ruth Bader Ginsburg, perhaps provides some insight. In the scene, Ginsburg decides at the last minute to substitute the word ‘gender’ for ‘sex’ in a legal brief she is writing, so as not to distract the court’s male judges with a potentially scandalous word. Whether this actually happened, we cannot know. But it is certainly true that, over the years, many lawyers, judges, and academics began to treat the words as synonyms, perhaps, like the fictionalized Ruth Bader Ginsburg, in order to avoid awkward intimate connotations.¹⁷

Once American society began to use ‘gender’ (which is culturally determined) as a synonym for ‘sex’ (which is biologically determined), it wasn’t a huge leap for postmodern

¹⁴ *Id.* at 55.

¹⁵ *Id.* at 53.

¹⁶ For example, in his policy blueprint released in 2022, former Vice President Mike Pence calls on Americans to “[p]reserve and protect female athletic competition by ensuring that sports competitions are between those who share their God-given gender.” Advancing American Freedom, <https://advancingamericanfreedom.com/american-culture/>.

¹⁷ See *e.g.*, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (Title IX case in which Justice Harry Blackmun repeatedly switches between the terms ‘sex’ and ‘gender’ without explanation); see also *J.E.B.*, 511 U.S. at 157 n.1 (1994) (Scalia, J., dissenting) (constitutional sex discrimination case in which Justice Antonin Scalia criticizes the Court for using the term ‘gender discrimination’ to mean ‘sex discrimination.’).

gender ideologues to insist that the only thing that actually matters is ‘gender identity’ (which is subjectively determined).¹⁸

C. *Bostock v. Clayton County*

In *Bostock v. Clayton County*, the Supreme Court held (6-3) that a male who identifies as a woman can sue a former employer for sex discrimination under Title VII.¹⁹

Contrary to conventional wisdom, *Bostock* did not interpret ‘sex’ as encompassing ‘gender identity.’ Rather, it proceeded on the assumption that sex “refer[s] only to biological distinctions between male and female.”²⁰

“
The notion that certain interests, behaviors, or modes of expression are distinctly male or female perpetuates harmful sex stereotypes.
”

The Court, nevertheless, decided that discrimination against a trans-employee is sex discrimination because it “intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”²¹ The Court reached this conclusion by adopting a “but for” test for liability, under which an employer will be found to have violated the law whenever the harm alleged by the employee would not have occurred if the employee had been born a different sex.²²

Although the *Bostock* majority may have taken this approach deliberately so as to avoid upending the common understanding of the word ‘sex,’ the “but for” test may, in the end, achieve everything that post-modern gender ideologues could have hoped for—and then some.

Implications

Although *Bostock* only addressed Title VII, lower courts and the Biden administration have taken the liberty of applying the ruling to other civil rights and public accommodations

¹⁸ Michael Robillard, *The Incoherence of Gender Ideology*, QUILLETTE (Aug. 4, 2021), <https://quillette.com/2021/08/04/the-incoherence-of-gender-ideology/>

¹⁹ 590 U.S. ___ ; 140 S. Ct. 1731 (2020).

²⁰ *Id.* at 1739; see also *id.* at 1736 (indicating the Court’s understanding that the employee’s sex is “different” from the employee’s gender identity).

²¹ *Id.* at 1741.

²² *Id.* at 1739.

laws.²³ The misapplication of *Bostock* outside the hiring and firing context has major negative implications for our ability to create equal opportunities for women, foster safety, protect privacy, and conduct research and collect accurate data.

- **Equal Opportunity:** Applying *Bostock* beyond workplace hiring and firing decisions undermines our ability to ensure compliance with laws that require equal opportunity for members of both sexes. The Court’s literal (rather than textual) interpretation of Title VII has particularly harmful consequences if applied to Title IX, which prohibits sex discrimination in education. Indeed, applying the “but-for” test to school sports would eliminate *all* single sex athletic teams. That is because a coach who decides that an otherwise qualified male athlete cannot play on a women’s team is clearly making a decision that would have been different but for the particular student’s sex, which *Bostock* prohibits.²⁴
- **Privacy/Safety:** Defining ‘sex discrimination’ to include discrimination on the basis of ‘gender identity’ allows any biological male, including those who have taken no steps surgically or chemically to alter their bodies, to simply identify into female private spaces, such as women’s **dorm rooms**, sororities, **prisons**, lockerrooms, rape crisis centers, and **domestic violence shelters**.
- **Science & Data Collection:** Defining ‘sex’ and ‘gender’ as synonyms also has concerning implications for the collection of data regarding education, crime, and the economic status of women.
- **Sex Stereotypes:** Perhaps one of the most concerning implications of our society’s conflation of ‘sex’ and ‘gender’ is that it has led to a resurgence of regressive sex stereotypes that generations of women fought to dismantle. The suggestion, for example, that a girl who wears her hair short, enjoys playing sports and roughhousing with male classmates, and then experiences discomfort with her body during puberty must *be* a boy cements sexist stereotypes about women and women’s bodies. Likewise, the idea that a boy who exhibits more feminine mannerisms and who enjoys playing dress-up with his female classmates is really

²³ See, e.g., *Adams v. Sch. Bd. of St. John’s Cty.*, 968 F.3d 1286, 13014-13015 (11th Cir. 2020) (applying *Bostock* to Title IX in the context of school bathrooms); *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399 (4th Cir. 2020) (same); *A.M. v. Indianapolis Public Schools*, 1:22-cv-01075- JMS-DLP (S.D. Ind. July 26, 2022) (applying *Bostock* to Title IX in the context of women’s sports); Dep’t of Education, Office for Civil Rights, Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 CFR Part 106, Docket ID ED-2021-OCR-0166 (July 11, 2022) (proposing rules to applying *Bostock* to all aspects of Title IX).

²⁴ Suppose, for example, that a male student who is cut from the men’s lacrosse team then tries out for the women’s team and demonstrates that he is a better player than any of the female students. Or suppose that a male student wants to play college field hockey, but his college only offers women’s field hockey (as is the case at most American schools that offer the sport). Applying *Bostock* to Title IX would forbid a coach from denying a roster spot to athletically superior male players simply because they are male.

a girl embraces patriarchal (and homophobic) notions of masculinity. In this way, gender ideology limits the freedom of individuals to live freely outside the confines of cultural stereotypes.

What You Can Do

- Stop using the word ‘gender’ in place of biological ‘sex.’
- Sign the **Women’s Bill of Rights** to indicate your understanding of ‘sex’ as a person’s biological sex (either male or female) at birth.
- Encourage your representatives to pass the WBoR into law.
- Urge your representatives to pass legislation protecting women’s sports.

Conclusion

Words matter. And it is important to be precise, particularly when discussing women’s distinct legal rights.