# How *Bostock v. Clayton* County Protects Harvard University's Final Clubs

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**This essay analyzes how the Supreme Court's decision in *Bostock v. Clayton County* on sex discrimination applies to Harvard University's lawsuit with the Final Clubs. Other Supreme Court cases supporting the right to intimate association for private clubs are also considered in the context of the lawsuit. Ultimately, *Bostock* determines that members of the Final Club are protected from sanctions, reaffirming their right to intimate association.**

**The issue first takes context within the history of Harvard, the Final Clubs, and their recent relations, most importantly Harvard's sanctions and the subsequent lawsuit. Next, this analysis of the U.S. Supreme Court case *Bostock v. Clayton County* establishes the concept of "but-for" causation for sex-based discrimination. This standard is then applied to Harvard's case to determine that Harvard's sanctions did indeed constitute sex discrimination.**

**Harvard's final clubs are also compared to and contrasted with other private clubs, such as Princeton's eating clubs and Boston's Somerset Club, and Harvard's lawsuit is further evaluated according to legal proceedings regarding private clubs, such as *Roberts v. U.S. Jaycees and Board of Directors*, *Rotary International v. Rotary Club of Duarte*. These cases provide the right of private clubs to intimate association, and comparisons to other clubs allow specific conclusions to be drawn about when a private club has that right.**

**Finally, the discussion explores the implications of these findings for unrecognized student organizations and students' personal relationships more broadly.**

## Introduction

As ancient, secretive clubs with elite alumni, Harvard University's single-sex final clubs have naturally stimulated much curiosity about what happens inside and how to join. Just as naturally, the exclusive clubs have also inspired conflict. Recent events highlight the interest and controversy surrounding the Final Clubs, such as the recall of Harvard College's student body co-president after a Final Club expelled him, bringing allegations of misconduct to light (Srivastava and Tan, 2024). Harvard's struggle lies in the fact that it cannot directly regulate the clubs, which lack recognition from Harvard and do not seek it, which has led the university to try influencing club members indirectly through sanctions. Thus, the question of how Final Clubs, other unrecognized groups, and their members are legally protected from Harvard's regulatory authority remains of great importance.

Harvard first attempted to sanction members of the single-sex Final Clubs in 2016, promptly receiving a lawsuit from some of the clubs. During the course of the case, the Supreme Court decided Bostock v. Clayton County (2019), making a landmark legal determination of sex discrimination by employing a "but-for" causation test: a method to determine if an outcome would have occurred if only one factor, such as sex, had been different. Fascinatingly, Harvard interpreted Bostock as protecting the sex-discriminating Final Clubs. Applying Bostock's "but-for" test to Harvard's sanctions reveals that the sanctions themselves discriminated on the basis of sex. Therefore, the Final Club members are protected from sanctions by Bostock, reaffirming their right to intimate association. Ultimately, students have a right to organize and associate privately, even if it is odious to the university.

This essay first contextualizes Harvard's historical relationship and recent lawsuit with the Final Clubs, which ended shortly after the Bostock decision. Next, Bostock's "but-for" test is analyzed to clarify how sex discrimination is determined. Bostock's reasoning is then extended to Harvard's lawsuit to show that Harvard's sanctions discriminated according to sex. Other court decisions regarding discriminatory private clubs are also identified as protecting Final Club members' right to intimate association. Finally, how the protections for Final Clubs apply to other student organizations is considered.

## Harvard's History, Sanctions, and Lawsuit with the Final Clubs

While they are sometimes compared to fraternities, Harvard's final clubs are a special type of undergraduate social organization due to their age, selectivity, and elusiveness. Therefore, when judging the legal merit of Harvard's sanctions, the Final Clubs must be evaluated according to their unique history and qualities.

As of 2021, there are six all-male Final Clubs (Scherer, 2021). Most of these are at least one hundred years old, date to "the 19th century and have had Kennedys, Roosevelts, and an endless procession of politicians, writers, and businessmen as former members" (Greenbaum, 2018). The Fly Club, for example, is almost two hundred years old, and in order to become a member, a student must first be invited to the "punch," similar to a fraternity's rush. Of the approximately one hundred students "punched," about twenty become members (Horton, 1992). The "punch" process produces a highly selective membership featuring "the wealthiest and connected individuals" (Scherer, 2021). Once students become members, they have access to the "clubhouses usually including dining areas, libraries, and a game room" (Scherer, 2021). The Final Clubs are also notably secretive. Some clubs have "strict rules about speaking with the press", and the Porcellian Club, for example, does not allow non-members to enter its clubhouse (Greenbaum, 2018). In short, the Final Clubs are longevous, opaque, and exclusive.

One might then compare the Final Clubs to Harvard for much of its history and would not be alone in doing so. Drew

Faust, Harvard's president at the time of the sanctions, wrote that "the final clubs in particular are a product of another era, a time when Harvard's student body was all male, culturally homogenous, and overwhelmingly white and affluent." Some members have countered that the Final Clubs are now racially and economically diverse (Greenbaum, 2018). Nevertheless, six Final Clubs remain all-male, and that is the root of the university's conflict with them.

Given their historical similarities, there was a time when Harvard had a congenial relationship with the Final Clubs. Harvard even used to "give preference to final club students for a special scholarship given to upperclassmen" (Horton, 1992). However, the university ended its official connections with the Final Clubs in 1984 because they "refused to admit women" (Horton, 1992). While Harvard's conflict has historically been with the all-male Final Clubs, there are now all-female Final Clubs as well (Scherer, 2021). In fact, one motivation for Harvard's sanctions was tied to a report that stated "a Harvard College woman is half again more likely to experience sexual assault if she is involved with a Club than the average female Harvard College senior," whether that was because she went to parties at all-male Final Clubs or she was in an all-female Final Club (Greenbaum, 2018). Another motivation was that the Final Clubs' exclusive selection practices contradicted Harvard's purported values of "gender, race, and socioeconomic" diversity (Greenbaum, 2018). Thus Harvard, in an attempt to combat discrimination, promote equality, and prevent sexual assault, developed sanctions against the Final Clubs.

In 2016, Harvard announced its sanctions against students who join "unrecognized single-gender social organizations." The sanctions would prevent students in these organizations from holding leadership positions in Harvard-recognized organizations and make them ineligible to receive the university endorsements necessary for scholarships such as the Marshall and Rhodes (Greenbaum, 2018). The sanctions applied to both all-male and all-female Final Clubs, as well as fraternities and sororities, and as a result, some clubs became gender-neutral in order to avoid the sanctions (Scherer, 2021). Other clubs, though, did not acquiesce, instead filing suit.

In Kappa Alpha Theta Fraternity, Inc. v. Harvard University, three fraternities, two sororities, and three students sued Harvard, alleging that its sanctions violated Title IX of the Educational Amendments of 1972. While no Final Clubs were directly involved in the lawsuit, they were considered alongside fraternities and sororities. When Harvard motioned to dismiss the lawsuit, the U.S. District Court for the District of Massachusetts only agreed that the two sororities and one of the students lacked standing, denying the rest of Harvard's motion (Kappa Alpha Theta Fraternity, 2019). In the eyes of then-Harvard President Lawrence Bacow, the District Court's denial seemed to signal that it "would ultimately grant judgment in the plaintiffs' favor" (Knieriem and Schumer, 2020). Before the case could be decided, however, Harvard dropped its sanctions following Bostock v. Clayton County, a Supreme Court decision on sex discrimination under Title VII of the Civil Rights Act of 1964. Since Harvard dropped its sanctions, the legality of the sanctions was never decided by a court (Knieriem and Schumer, 2020). Thus, the legal protection of Harvard's final clubs remains an open question, and one that must first be considered where it ended: with Bostock.

## Sex Discrimination as defined by *Bostock v. Clayton County*

To determine whether employment discrimination because of sexuality or transgender identity constitutes sex discrimination, Bostock employs a "but-for" test to isolate the sex of the individual. Such a test reveals that sex can be an implicit reason for discrimination even if the discrimination ostensibly targets something else. Therefore, any factor in which sex plays a role is protected from discrimination under Title VII.

Bostock establishes "but-for" causation to prove when sex discrimination has occurred, even if sex is not the obvious or direct cause. While sexuality, for example, is not equal to sex, the Supreme Court tested whether it depended on sex by "chang[ing] one thing at a time and see[ing] if the outcome changes" (Bostock, 2020). To clarify the role that sex plays in sexuality so that sex alone can be changed, an employment policy against homosexuality can be described as one against men who are attracted to men. Then, to determine whether such a man has faced discrimination, the Court, using the "but-for" test, changes one aspect (the sex of the man) and questions whether a woman who is attracted to men would have been treated the same. Since a woman who is attracted to men is not homosexual, she would have been treated differently, and thus, policies against homosexuality necessarily discriminate based on sex. Essentially, it is discriminatory for employers to penalize "men for being attracted to men and women for being attracted to women" but not women for being attracted to men and men for being attracted to women (Bostock, 2020).

The Court rejects several counterarguments, affirming that anything that depends on sex is protected. Firstly, "a defendant cannot avoid liability just by citing some other factor" (emphasis in original) (Bostock, 2020). Even if homosexuality is an employer's primary concern and the employer does not care if it discriminates against men or women, sex is still a fundamental component of sexuality and thus the employer's concerns. Additionally, it is not redeeming that an employer "discriminates against both men and women because of sex" (Bostock, 2020). For example, a policy against homosexuality is not allowed even though it applies to both men and women because it discriminates against men attracted to men and women attracted to women, which is still sex-based. Furthermore, a policy can be discriminatory at the individual level "even if the scheme promotes equality at the group level," such as a pension plan that tries to account for life expectancy by requiring women to pay more (Bostock, 2020). It makes no difference whether an employer has other intentions, be it prejudice against homosexuality or a goal for equality, if the employer's treatment depends in any part on the sex of the individual.

The Court also rejects the notion that changing someone's sex in the "but-for" test requires changing other factors, grounding discrimination in the sex of the individual alone. To test whether a homosexual man has faced discrimination, the "but-for" test does not "just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual)" (Bostock, 2020). However, the behavior in question (being attracted to men) remains the same, and the Court rejects the idea that the test should change "both his sex and the sex to which he is attracted" (Bostock, 2020). Doing so obfuscates the fact that an employer opposed to homosexuality tolerates attraction to men in women but not in men. Discriminating against other factors that depend on sex is not allowed, and if the "but-for" test changes a factor, that factor must depend on sex.

However, Bostock acknowledges significant limitations on the decision. Rather than accepting broad consequences in the ruling, the decision specifies that "[u]nder Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind" (Bostock, 2020). Thus, Bostock is a ruling that only firmly addresses the issue of sex discrimination in employment. Although the decision declines to make any sweeping judgments, it does not place any limits on its reasoning for what is sex-based. Instead, the decision emphasizes that what separates this case from others is the definition of discrimination, which, "[a]s used in Title VII… refers to 'distinctions or differences in treatment that injure protected individuals'" (Bostock, 2020). Thus, while sex-segregated bathrooms are indeed sex-based, it is not necessarily an injurious difference in treatment to require men to use one bathroom and women to use another. While Bostock confines its decision on what constitutes discrimination to Title VII, it does not limit the "but-for" test for determining what is sex-based.

Despite limiting its judgment to Title VII, the Bostock decision still establishes an expansive definition of sex-based discrimination. While it may not be immediately clear why factors tangentially related to sex–such as same-sex relationships–are protected in the same way as sex itself, the Court's ruling clarifies that whenever changing someone's sex would change another characteristic, that characteristic is considered sex-based and is protected as such.

## *Bostock v. Clayton County* as applied to Harvard's Lawsuit with the Final Clubs

The principles established in Bostock are relevant to Harvard's lawsuit with the Final Clubs because both cases rest upon determining if certain actions constitute sex discrimination, as recognized by Harvard itself (Knieriem and Schumer, 2020). Using Bostock's "but-for" test, Harvard's sanctions against single-sex organizations are shown to discriminate according to sex in the same way that employment policies against single-sex relationships would.

It is first worth considering whether Bostock's limited Title VII decision is directly applicable to Harvard's case. As a federally-funded educational institution, Harvard is subject to Title XI, which also prohibits discrimination based on sex (Kappa Alpha Theta Fraternity, 2019). In Kappa Alpha Theta Fraternity, Inc. v. Harvard University, the ruling on Harvard's motion to dismiss the lawsuit, the U.S. District Court for the District of Massachusetts pairs Title VII to Title XI since "Courts in the First Circuit cite cases from the Title VII context in analyzing the scope of Title IX" (Kappa Alpha Theta Fraternity, 2019). Thus, while Bostock is partially restricted to cases of employment under Title VII, it can nonetheless be fully applied to Harvard's lawsuit, which falls under Title IX. While Bostock's reasoning for what is sex-based would be applicable regardless, the connection between Title VII and Title IX means that Bostock's definition of discrimination extends to Harvard's case as well. Harvard's sanctions did not allow students in single-sex groups to hold official leadership positions or receive scholarships requiring school endorsement. As such, Harvard was "treating that individual worse than others who are similarly situated" (Bostock, 2020). The Bostock decision is directly applicable, and Harvard was treating Final Club members discriminately.

Furthermore, Bostock's "but-for" test reveals that Harvard's sanctions against Final Club members were sex-based. A sanction against members of single-sex organizations inherently depends upon the sex of the member, whether they are male or female. For example, Harvard's sanctions applied to male students who joined all-male Final Clubs, but not female students who joined all-male clubs. While this example may seem self-defeating since a female student could never join an all-male club, it follows the Supreme Court's "but-for" test, where only one aspect can be changed.

One may object that if a female student did join an all-male club, it would no longer be all-male, and that is why Harvard's sanctions would not apply. One may then suggest that a man in an all-male Final Club instead be compared to a woman in an all-female Final Club. However, Bostock rejects the notion of changing other factors alongside sex. When considering whether a homosexual man faces sex discrimination, he must be compared to a woman who is also attracted to men, not a woman who is attracted to women (Bostock, 2020). Regarding protection from sex discrimination, single-sex clubs and single-sex relationships are therefore analogous.

Additionally, according to Bostock, Harvard's sanctions cannot be justified by other means since they have "but-for" causation. While Harvard's direct intention may not have been to discriminate according to sex, it is irrelevant if "other factors" motivated Harvard (emphasis in original) (Bostock, 2020). Ironically, Harvard commits sex discrimination when it sanctions single-sex clubs even if it was attempting to foster "equality at the group level" (Bostock, 2020). Thus, Harvard's sanctions are not justified even though they apply to both men and women. Sanctioning women in all-female clubs and men in all-male clubs is comparable to "an employer who fires both lesbians and gay men equally [which] doesn't diminish but doubles its liability" (Bostock, 2020). Despite Harvard's other motivations, the sanctions do not withstand Bostock's "but-for" test.

Even Harvard seemingly acknowledged that their sanctions would not pass the "but-for" test by ending them, making the lawsuit moot. Scherer correctly points out that Harvard's choice to drop its sanctions "is not binding on other colleges and universities" (Scherer, 2021). Harvard's choice is not binding for itself either, and Harvard may have dropped the sanctions before there was a court decision to avoid being "legally barred" from creating similar policies in the future (Knieriem and Schumer, 2020). The legal avenue for sanctions against single-sex Final Clubs remains open, at least technically. However, Scherer also properly notes that "having such an elite university interpret a Supreme Court decision this way will deter other colleges and universities from enacting similar policies" (Scherer, 2021). Instead of sanctions, Scherer proposes two options for other universities to regulate fraternities and sororities, either unrecognizing all Greek life or keeping it on campus so as to regulate it (Scherer, 2021). Harvard, though, has no such choice, unless the unrecognized single-sex Final Clubs seek recognition.

A specific comparison of Bostock to Kappa Alpha Theta reveals that Harvard's sanctions against members of Final Clubs constitute sex discrimination. While there may be no legal method for Harvard to regulate single-sex Final Clubs, perhaps Harvard could sanction unrecognized organizations "without using the words man, woman, or sex (or some synonym)," such as by sanctioning all exclusive social clubs (Bostock, 2020). Even then, however, Final Clubs may be protected as intimate associations in the same way that personal relationships are.

## Other Court Cases on Discriminatory Private Clubs

Harvard's final clubs are certainly atypical, but there are similar organizations that have inspired informative litigation prior to the Bostock decision, creating additional relevant case law. While

regulations on other organizations have been upheld, the Final Clubs remain protected because they are non-public, non-business intimate associations.

The Final Clubs are unique but still have their Ivy League peers. Perhaps unsurprisingly for exclusive universities, Brown, Columbia, Cornell, Dartmouth, the University of Pennsylvania, and Yale have "secret collegiate societies" of their own (Scherer, 2021). Princeton's eating clubs are an especially enlightening example, both because they faced lawsuits and because of their key differences from the Final Clubs. The New Jersey Supreme Court ruled in Frank v. Ivy Club (1990) that the discriminatory policies of the Eating Clubs were not protected because the clubs have an "integral connection and mutual benefit" with Princeton, since most upperclassmen used the clubs and the university "depended on the clubs to provide meals to students" (Horton, 1992). The Final Clubs, conversely, do not provide any service for most students or the university and as such, they do "not fall under the state public-accommodations law" (Horton, 1992). They cannot, then, be regulated on the same grounds as organizations that provide a public benefit.

Non-public clubs can still be regulated if they have professional purposes, however. Take, for example, the Somerset, a Boston social club considered the "most prestigious of clubs." After the Boston Licensing Board threatened to revoke "the food and liquor licenses of clubs that have more than 100 members, are used for business or professional purposes and choose members on the basis of sex, race, color or religion," the Somerset agreed to admit women (Hornblower, 2000). The "business or professional purposes" are the key distinction between the Somerset and the Final Clubs. Likewise, the Supreme Court has recognized in New York State Club Association v. New York City (1988) that cities can pass laws that limit sex discrimination in "organizations which are 'commercial' in nature" (Horton, 1992). The City of Cambridge has had past conflicts with the Final Clubs and may be willing to pass a law regulating them (Edwards and Montgomery, 2024). However, it does not seem that undergraduates represent "the city's business and professional community," nor that there is "business and commerce transacted at the clubs" (Horton, 1992). Since the Final Clubs are non-business organizations, they are protected from regulation under New York State Club Association.

The Supreme Court has recognized the rights of non-public, non-business clubs before. Both Roberts v. U.S. Jaycees (1984) and Board of Directors, Rotary International v. Rotary Club of Duarte (1987) held that organizations have a right to intimate association if they have "a relatively small size, a high degree of selectivity in decisions to begin and maintain the relationship, seclusion from others in critical aspects of the relationship, and purpose of the relationship" (Horton, 1992). Therefore, discrimination in private clubs can be regulated in some cases, such as if a club is large, serves a public purpose, or is commercial in nature. The Final Clubs, as small, selective, and secretive social clubs, are protected as intimate associations.

## Discussion

Under the "but-for" test in Bostock v. Clayton County, the Final Clubs are protected from Harvard's sanctions on the grounds that the sanctions against single-sex clubs implicitly discriminate according to sex. Even if Harvard attempted to regulate the Final Clubs for reasons other than their single-sex status, the clubs are protected by the right to intimate association recognized by Roberts and Rotary International. Thus, Harvard's final clubs are protected from University sanctions or regulation. While any sanctions on the Final Clubs would affect a relatively small number of students, the legal protections for Final Clubs are not without their implications for the greater student body.

The Final Clubs, as unrecognized student organizations, are merely intimate associations in the same way as other relationships between students. The protections for Final Clubs, therefore, extend to all private relationships among students, whether that be friendships or unofficial student groups. Given that Harvard would not recognize any new organizations during the 2023–2024 academic year, the importance of protections for unofficial student groups has greater relevance (Jones and Peña, 2023). Additionally, Harvard has no obligation to recognize student groups. While *Healy v. James* (1972) recognized "a 'heavy burden' of justification on a public college or university seeking to deny a student organization recognition and the concomitant benefits," it did not establish such a standard for private universities like Harvard (Hauser, 1990). Since Harvard can limit which organizations are recognized, the rights of unrecognized organizations become paramount.

The protections for the Final Clubs under Bostock, Roberts, and Rotary International mean that students are protected in their personal relationships from University regulation. In the same manner that Final Clubs are protected from sanctions, no student can be sanctioned merely for belonging to any intimate association. Thus, students are protected in their private actions, whether that be joining a Final Club, personal relationships, or other private groups, regardless of what the university thinks of those actions.

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