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Abstract

LGBT rights in the United States have come a long way in the past few decades. Cases such as *Lawrence v. Texas* and *Obergefell v. Hodges* have shown the critical role of the Supreme Court in attaining equality for LGBT people. *Bostock v. Clayton County* is the latest case of this kind. *Bostock* firmly established that workplace discrimination based on gay or transgender status was forbidden under Title VII of the Civil Rights Act of 1964. This essay examines the case's majority opinion—written by conservative Justice Gorsuch—and Justice Kavanaugh's dissent. It establishes that Justice Gorsuch used a living textualism approach to interpret the word sex under a modern lens. Justice Gorsuch rejected the idea of original intent, claiming that only Article VII's literal words matter in its interpretation. Justice Kavanaugh took issue with this, representing the age-old ideological debate of legislating from the bench.

Keywords

LGBT rights, United States Supreme Court, Civil Rights Act of 1964, Title VII

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Two Years Later

*Laura Kerharo***Abstract**

LGBT rights in the United States have come a long way in the past few decades. Cases such as *Lawrence v. Texas* and *Obergefell v. Hodges* have shown the critical role of the Supreme Court in attaining equality for LGBT people. *Bostock v. Clayton County* is the latest case of this kind. *Bostock* firmly established that workplace discrimination based on gay or transgender status was forbidden under Title VII of the Civil Rights Act of 1964. This essay examines the case's majority opinion—written by conservative Justice Gorsuch—and Justice Kavanaugh's dissent. It establishes that Justice Gorsuch used a living textualism approach to interpret the word sex under a modern lens. Justice Gorsuch rejected the idea of original intent, claiming that only Article VII's literal words matter in its interpretation. Justice Kavanaugh took issue with this, representing the age-old ideological debate of legislating from the bench.

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Introduction

The last few decades have seen incredible advancement for lesbian, gay, bisexual, and transgender (LGBT) rights in the United States. On the federal judiciary level, several cases have been instrumental in developing LGBT rights. The first major case of its kind was *Lawrence v. Texas* (2003), which repealed individual state sodomy laws banning same-sex intercourse. The case reversed *Bowers v. Hardwick* (1982), which had upheld Georgia's sodomy laws and served to legally tie "sodomy"—then meaning non-procreative sexual behavior—purely to homosexual sex (Burgess, 2006). Using the judgment of *Planned Parenthood v. Casey* (1992), the *Lawrence* verdict also claimed that the core of liberty is a person's ability and privacy in deciding their personal lives, including their choices regarding consensual sexual encounters. The Court further supported the claim by noting that sociological and psychological research had shown no inherent harm caused by simply being homosexual (Spindelman, 2004). The case was a significant victory for divorced gay parents, as sodomy laws could no longer be used to undermine them in custody hearings (Naeger, 2004). A little over a decade later, *Obergefell v. Hodges* (2015) settled the debate over same-sex marriage raging throughout the American states by reestablishing marriage as a civil right and declaring laws banning or restricting same-sex marriage unconstitutional. The written majority opinion was particularly noteworthy for its poetic phrasing, invoking the spirit of love and romance deemed inherent to same-sex marriage. Not only was the case a glowing ray of legal support for same-sex couples, but it also helped legitimize it in a moral and emotional way (Walker, 2020).

As legal support and legitimacy grew for LGBT rights, public opinion continued to shift towards its support. A 2014 study

by Kreitzer, Hamilton, and Tolbert studied the effects of the legalization of same-sex marriage on public opinion of LGBT issues. The study found that citizens in Iowa were more likely to support LGBT rights after the legalization of same-sex marriage by the Iowa Supreme Court, even if they had not previously supported it. They concluded that their data supported the existence of a feedback loop in moral policy—especially for policies that legitimize a minority group—due to a perception of judicial legitimacy. Another study by Rhodebeck, Gainous, and Gray (2014) found that while popular morality politics were generally influenced by political elites, those elites were subject to political morality changes themselves if they saw their constituency move towards the other side of an issue. An example of this would be former President Barack Obama, who claimed to oppose same-sex marriage in his 2008 Presidential campaign before changing his official stance shortly after due to public opinion regarding LGBT rights. During his presidency, Obama would repeal the discriminatory Don't Ask, Don't Tell military policy and ban LGBT discrimination for employees working federal contracts (Steinmetz, 2015). These studies, in conjunction, show that legal rulings, like *Obergefell*, have a substantial effect on voting and public policies beyond their immediate effects.

In 2020, the next landmark Supreme Court case involving LGBT rights surrounded Article VII of the Civil Rights Act of 1964. The Civil Rights Act was passed by Congress with the principal goal of banning private discrimination based on race. Ironically, southern conservatives were the ones to introduce sex discrimination in the bill, hoping to crush its support in Congress by playing on congressional misogyny (Barzilay, 2016). However, due to the efforts of several American feminist movements, the bill passed with the added sections. As a result,

the Civil Rights Act of 1964 banned all workplace discrimination “because of an individual’s race, color, religion, sex, or national origin” (Civil Rights Act of 1964, 1964, p. 13).

This brings us to the subject of this paper: the 2020 Supreme Court case *Bostock v. Clayton County*. In 2013, Gerald Lyn Bostock, a gay man, was fired from his job as a child welfare advocate in Clayton County, Georgia, for “unbecoming” conduct. Prior to his firing, Bostock had received several favorable performance reviews and excellence awards. He alleged his firing was “unwarranted and prompted due to his sexual orientation and failure to conform to gender stereotypes” (Carter, 2020, p. 61). He also claimed that the catalyst for this discrimination was his joining of an all-gay softball team—which publicly affirmed his sexuality—and that his participation on the team was mentioned negatively during meetings with the Friends of Clayton County CASA Advisory Board. The case was argued in front of the United States Supreme Court in 2020. The Court sided with Bostock, claiming that discrimination based on sexual orientation and gender identity was prohibited by Article VII of the Civil Rights Act (Carter, 2020). This paper examines *Bostock v. Clayton County*’s majority opinion and Kavanaugh’s dissenting opinion in order to argue that the case was not an overexertion of the Supreme Court’s judiciary power.

Living Textualism

The Supreme Court usually follows one of two interpretations of the law: original intent and living document. Traditionally adhered to by conservative judges, the doctrine of original intent refers to the judicial idea that laws and documents should be followed as they were intended by their original writers. Liberal judges are more likely to follow the living document doctrine. The antithesis of the doctrine of original intent, a living

document, is based on the idea that a document changes over time and must be interpreted and upheld through a modern lens. When looking at a legal document—like the U.S. Constitution or the Civil Rights Act of 1964—judges should apply a modern reading to the law and “modify or ignore those portions that are not [modern enough]” (McConnel, 1997, p. 1128). However, another popular legal theory called the living document doctrine can create issues in statutory cases. This is because laws interpreted by the Supreme Court are relatively recent and cannot be interpreted too loosely. Many believe that original intent should be adhered to in statutory cases for this exact reason.

Critics of the *Bostock v. Clayton County* take issue with the majority’s interpretation of the law—specifically Justice Gorsuch’s definition of “sex”—as they do not coincide with the original intent. They believe that the Supreme Court unjustly placed current politics over the true intentions of the 1964 Congress (Lund, 2020). Justice Gorsuch admits that the majority of lawmakers who passed the Civil Rights Act “might not have anticipated their work would lead to this particular result” (*Bostock v. Clayton County*, 2020). This is indeed a sensible deduction. At the time, the LGBT civil rights movement was small and decentralized. While LGBT rights groups existed, they focused on individual cases of discrimination rather than legal and social discrimination as a whole. In fact, the crux of the twentieth-century queer rights movement would occur later in the decade with the Compton’s Cafeteria Riot in 1966 and the Stonewall Riots—which brought national attention to LGBT discrimination—in 1969 (Stryker, 2017).

However, while it is undeniable that LGBT rights were not the motivation behind the creation of Title VII, Justice Gorsuch did not find this to matter. The Supreme Court Justice

wrote that “only the written word is the law, and all persons are entitled to its benefit” (*Bostock v. Clayton County*, 2020). By stating this, he “utilized the principles of textualism” as he “relied on the ordinary public meaning of the statute and refused to consider extratextual sources” (Capparelli, 2021, p. 1421). This is the exact opposite of the doctrine of original intent, which shows that the Supreme Court’s majority was purposely rejecting that particular judicial interpretation.

Since the Supreme Court rejected original intent in their opinion, one would assume that they used the living document doctrine instead. However, they did not. Instead, Justice Gorsuch applied a third interpretation: living textualism. A spiritual sibling to living document, living textualism uses the same form of reasoning—the law must be interpreted through a modern lens—but does this through the interpretation of the literal text. In this view, the actual text is the most important part of the law and must be examined thoroughly. However, the text is subject to interpretation, one that changes drastically over time (Lund, 2020).

A Summary of Sex in the Majority

Bostock’s majority opinion hinges on the definition of the term sex in Title VII of the Civil Rights Act of 1964. The majority opinion was written by conservative Justice Gorsuch – adhering to the Court’s tradition of having the ideological opposition write the opinion to further the ruling’s legitimacy. Justice Gorsuch decided to focus entirely on the word sex as used in the phrase “because of . . . sex” as he considered it the most important part of Title VII. Like many phrases and terms used in laws and Supreme Court cases, the word sex was surprisingly ambiguous. The Court had to decide whether discrimination based on sexuality was synonymous with discrimination based on sex. The Court decided

that Clayton County's actions were in violation of Title VII (*Bostock v. Clayton County*, 2020).

This ruling broadened the definition of sex-based discrimination to include all discrimination remotely related to a person's sex. Justice Gorsuch wrote that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex" (*Bostock v. Clayton County*, 2020, p. 2). This ties into the very definition of homosexuality, which is an attraction to someone of the same sex. In cases of discrimination against LGB people, what matters entirely is their sex. It is what dictates the sex of a traditionally "proper" sexual and romantic partner. The main difference between a homosexual man and a heterosexual woman is their sexes. A woman would not be discriminated against for being attracted to a man because they are of opposite sexes; meanwhile, were a man to feel attraction to the exact same man, he would be discriminated against. This same logic can also be applied to bisexual and pansexual individuals, as their attraction to genders and sexes, other than theirs, defines their sexualities. In the case of *Bostock*, had he been a woman openly attracted to men, he would not have gotten fired for being gay. The same logic can be applied to a transgender individual. Someone who is transgender is someone who does not identify with the gender placed upon them due to their biological sex. If an individual is born with the male sex but identifies as a woman, then they are rejecting their biological sex. The main difference between a trans woman and a cisgender woman is the assigned sex with which they were born. If the trans woman is discriminated against, but the cisgender woman is not, that is because of sex (*Bostock v. Clayton County*, 2020). The use of the word sex in both definitions and explanations show how integral

sex is in defining these identities, as well as who does and does not get discriminated against.

A Summary of Particular Circumstances

Because of Title VII's otherwise straightforward structure, particularly the phrase "because of sex," any discrimination based around sex is rendered illegal. Therefore, with this new definition by the Supreme Court, any discrimination based on sexual orientation and gender identity is banned by federal law. Furthermore, as an employee's gay or transgender status is wholly unrelated to non-discriminatory employment decisions, they cannot logically and legally be taken into account. To highlight this, the majority opinion responds to certain instances brought up by *Clayton County*. For example, it does not matter if an employer treats an employee differently because of discriminatory *and* non-discriminatory reasons, as those unlawful reasons are still present and makes the treatment unlawful. "Unintentional" discrimination is also no excuse for employers because Title VII bans "discrimination against individuals, not groups" (*Bostock v. Clayton County*, 2020, p. 8). Asking an employee or applicant to disclose their sexuality or transgender status is also banned, as both the employer and the individual must not consider sex when asking or answering professional questions (*Bostock v. Clayton County*).

Justice Kavanaugh and Legislating From the Bench

Justice Kavanaugh's dissent revolved around his belief that *Bostock's* precedent is too extreme a departure from previous rulings and surpassed the political powers of the Supreme Court. This is part of a much larger debate surrounding the idea of legislating from the bench. In order to understand this debate, it is important to note the Supreme Court's role in the United States Constitution. The Supreme Court is the highest court in the

country and presides over all other courts with supreme judicial power. The most important part of Article III – the part of the U.S. Constitution that establishes the Supreme Court – is the fact that that power “shall extend to all cases, in law and equity, arising under ... the laws of the United States” (U.S. Const. Art. III, §. 2). Therefore, we have statutory cases such as *Bostock*, which interprets a law passed by Congress. This is, at its core, a check for Congressional power. But can Congress go too far? The Constitution gives no answer. In fact, other than that phrase and a few other details, Article III is frustratingly vague. “Legislating from the bench” refers to the idea that a Justice or Court decision has surpassed the limits of Article III and is acting as a legislator, which according to Article I, means that they are creating a law or amending one much too drastically. However, Justice Gorsuch justifies his use of living textualism for this very reason. He writes that “only the words on the page constitute the law adopted by Congress and approved by the President” (*Bostock v. Clayton County*, 2020, p. 4); therefore, looking at anything other than the actual law would be doing the work of a legislator. For him, changing the actual text constitutes legislating from the bench. Because the extent of the Supreme Court’s power over the legislature is vague and up to personal interpretation, Justice Gorsuch’s understanding of the idea is perfectly valid. And in his framing of the majority opinion, he is *not* legislating from the bench.

Furthermore, *Bostock v. Clayton County* is the result of decades of legal precedents as the Supreme Court had begun interpreting Title VII in a more liberal manner decades prior. In one of the first cases, *Meritor Savings Bank v. Vinson* (1986), the Supreme Court found that sexual harassment in the workplace was a subsection of sex discrimination and was therefore

forbidden. *Oncale v. Sundowner Offshore Services, Inc.* (1998) then established that same-sex harassment and discrimination were also covered by Title VII, stating that while Congress likely did not intend to cover this phenomenon under Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils” (*Oncale v. Sundowner Offshore Services, Inc.*, 1998, p. 79). Later, *Price Waterhouse v. Hopkins* (1989) set the precedent that Title VII banned discrimination based on sex stereotypes. This interpretation meant that the perception of a person’s sex—rather than just their actual sex—was forbidden under Title VII. So, *Bostock* was far from the first case to look at Title VII from a liberal perspective. The question posed in *Bostock*—whether discrimination based on sexuality violated Title VII—had also already been asked in lower United States courts. Multiple courts interpreted Title VII according to the Supreme Court’s logic in *Waterhouse*: LGBT employees were protected under Title VII. The sixth circuit court ruled in *Barnes v. City of Cincinnati* (2005) and *Smith v. City of Salem* (2004) that discrimination based on sexual orientation and gender identity were based on gender stereotypes and forbidden under the *Waterhouse* precedent. In *Senegal v. Yum! Brands Inc.* (2019), the fifth circuit ruled in favor of a gay employee using *Waterhouse*’s precedent as well (Valenti, 2020), although they refused to go further than the idea that homophobia is due to sex stereotyping.

Ultimately, if Congress does find issue with this interpretation of the Civil Rights Act, it can always reverse the precedent by way of legislature. This has happened many times in American history, and one notable instance also had to do with Title VII. *Ledbetter v. Goodyear Tire and Rubber Co.* (1998) focused on a very specific procedural detail in the upholding of Title VII. In the case, Lilly Ledbetter was refused a raise and given

consistently low rankings when working for Goodyear Tire and Rubber Co. —leading to a lower pay rate than her male coworkers—which she alleged was a direct result of sex-based discrimination and for which she filed a formal EEOC charge for disparate pay. The Supreme Court ruled that a plaintiff *could not* bring forward a suit under Title VII if the results of the discriminatory action (in this case disparate pay) occurred during the Act's 180-day statutory limitations period, but the action itself occurred outside of the 180 days. Congress disagreed with this interpretation and passed the Lilly Ledbetter Fair Pay Act in 2009, reversing the *Ledbetter* precedent (Zisk, 2009). The same could still happen with *Bostock v. Clayton County* if Congress takes as much issue with the ruling as Justice Kavanagh.

Conclusion

Bostock v. Clayton County (2020) was a significant victory for LGBT rights. The case set the precedent that LGBT employees were protected from discrimination by Title VII of the Civil Rights Act of 1964. In the majority opinion, Justice Gorsuch reasoned that while the 1964 Congress did not intend to protect LGBT people when passing the law, it must be interpreted based on its text alone. He applied a modern understanding of the term sex in order to extend its understanding beyond the male and female sexes. This reasoning was in line with previous Supreme Court—notably *Waterhouse*—and several interpretations by lower courts. Justice Kavanagh's dissenting opinion claimed that the Supreme Court had gone too far with this verdict and was doing the work of the legislature rather than the judiciary. However, the Supreme Court was justified in this ruling and interpretation of Title VII because it was based on the literal word of law and coincided with previous interpretations of Title VII. Additionally, if Congress truly believes Title VII has been

misinterpreted, it can nullify the precedent as it did with *Ledbetter*.

Bostock shows how nuanced American laws can truly be. Even a phrase as short and simple as “because of sex” can have varying legal interpretations and consequences. It also shows how the makeup of the Supreme Court can have a drastic effect on how the law is applied, especially in minority rights cases. With the confirmation of Justice Amy Coney Barrett later that year, *Bostock* would not have been interpreted the way that it was had it been argued a few months after. Barrett’s confirmation also places *Bostock*’s ruling at risk as the Supreme Court has the conservative supermajority to reverse the precedent. While it is highly unlikely that the Supreme Court will overturn one of its own decisions so soon after making it, Congress should be ready to protect its LGBT constituents if this occurs.

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